

269

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 37

Dis

**CENTRAL UNION TELEPHONE COMPANY, PLAINTIFF IN
ERROR,**

vs.

CITY OF EDWARDSVILLE, ILLINOIS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Martin

FILED FEBRUARY 12, 1924

(30,130)

[The page contains faint, illegible handwriting, likely bleed-through from the reverse side.]

(30,133)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 293

CENTRAL UNION TELEPHONE COMPANY, PLAINTIFF IN
ERROR,

vs.

CITY OF EDWARDSVILLE, ILLINOIS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX

	Original	Print
Proceedings in supreme court of Illinois.....	1	1
Caption.....(omitted in printing)..	1	1
Record from appellate court, fourth district.....	2	1
Caption.....(omitted in printing)..	2	1
Order transferring cause to supreme court.....	4	1
Order of supreme court transferring cause to appellate court	5	2
Order taking certain motions under advisement.....	7	2
Order of submission.....	8	3
Judgment, September 23, 1922.....	9	3
Order modifying opinion and denying rehearing.....	11	4
Judgment, November 16, 1922.....	12	4
Assignment of errors.....	14	5
Clerk's certificates.....	17	6
Record from circuit court of Madison County.....	18	7
Caption.....(omitted in printing)..	18	7
Declaration	19	7
Summons and sheriff's return.....	21	8

	Original	Print
General issue and special pleas of defendant.....	22	9
Demurrer to special plea.....	27	11
Order sustaining demurrer.....	29	12
First amended special plea.....	31	12
Second special plea.....	38	15
Third special plea.....	39	16
Fourth special plea.....	41	17
Demurrer to first amended special plea.....	43	18
Demurrer to second, third, and fourth special pleas.....	44	19
Order sustaining demurrers.....	47	19
Submission of cause.....	49	19
Judgment	50	20
Bill of exceptions.....	51	20
Stipulation of facts.....	52	20
Plaintiff's propositions of law.....	59	25
Defendant's propositions of law.....	61	26
Order settling bill of exceptions.....	66	29
Bond on appeal..... (omitted in printing) ..	67	30
Clerk's certificate to bill of exceptions.....	72	30
Assignment of errors.....	73	30
Submission of cause.....	75	31
Opinion, Carter, J.....	77	32
Judgment	82	35
Clerk's certificate.....	83	36
Petition for and order allowing writ of error.....	85	36
Petition for rehearing.....	106	47
Assignment of errors.....	114	52
Bond on writ of error..... (omitted in printing) ..	119	54
Writ of error.....	124	54
Certificate of lodgment.....	126	55
Citation and service..... (omitted in printing) ..	128	56
Return to writ of error.....	130	56

[fol. 4] **IN APPELLATE COURT, FOURTH DISTRICT**

[fols. 2 & 3] Caption in Appellate Court, Fourth District omitted

[fol. 1] Caption in Supreme Court of Illinois omitted

CITY OF EDWARDSVILLE, Appellee,

vs.

CENTRAL UNION TELEPHONE Co., Appellant

Appeal, Circuit Court, Madison Co.

ORDER TRANSFERRING CAUSE TO SUPREME COURT—Filed Nov. 10,
1921

And now on this day the Court having diligently examined and inspected the record and proceedings aforesaid as well as the briefs and argument filed herein and now being fully advised in the premises are of the opinion, find, and adjudge that this case was wrongfully appealed to this Court.

Therefore it is ordered by the Court that this cause be and the same is hereby transferred to the Supreme Court of this State, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Supreme Court.

And it is further considered by the Court that the said Appellee recover of and from the said Appellant his costs by him in this behalf expended in due course of law.

I, Robert B. Roe, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, do hereby certify that the foregoing is a true copy of an order of said Appellate Court for the Fourth District of Illinois of record in my office.

In testimony whereof, I have set my hand and affixed the seal of said Appellate Court at Mt. Vernon this 10th day of November, A. D. 1921.

Robert B. Roe, Clerk of the Appellate Court.

[File endorsement omitted.]

[fols. 5 & 6]

IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER OF SUPREME COURT TRANSFERRING CAUSE TO APPELLATE COURT—Filed in Appellate Court, March 16, 1922

And now on this day the Court having diligently examined and inspected the record and proceedings aforesaid as well as the briefs and argument filed herein and oral argument by counsel, and now being fully advised in the premises are of the opinion, find, and adjudge that this case was wrongfully appealed to this Court.

Therefore it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court of the Fourth District of the State of Illinois and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

And it is further ordered by the Court that the said Appellee recover of and from the said Appellant its costs by it in this behalf expended and that it have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files, and seal thereof, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court, at Springfield, in said State, this 28th day of February, A. D. 1922.

Charles W. Vail, Clerk of the Supreme Court. (Seal.)

[File endorsement omitted.]

[fol. 7]

IN APPELLATE COURT, FOURTH DISTRICT

[Title omitted]

ORDER TAKING CERTAIN MOTIONS UNDER ADVISEMENT—Entered April 14, 1922

On this day comes the appellant plaintiff in error and enters a motion herein to reverse and remand this cause, and for costs and for execution; and the Court not being fully advised as to said motion takes the same under consideration until the final determination of said cause.

And on the same day comes the appellee defendant in error and enters a motion herein to affirm this cause and for procedendo, and for costs and execution; and the Court not being fully advised as to said motion, takes the same under consideration until the final determination of said cause.

[fol. 8] IN APPELLATE COURT, FOURTH DISTRICT

[Title omitted]

ORDER OF SUBMISSION—April 14, 1922

On this day come the said parties, by their attorneys, and this being one of the days set apart for the call of the docket under the rules or orders of the Court for this Term, and this cause coming now on to be heard, the Appellant having entered motion to reverse the judgment and remand said cause, and for costs and the Appellee having entered motion to affirm the judgment herein and for costs and for procedendo, and said motions being taken under advisement for final hearing, and the Clerk reporting to the Court that said cause is now ready to be taken on the call of the docket.

It is ordered by the Court that this cause be now submitted upon the Records, Abstracts, Briefs and Arguments filed herein under the rules or order of the Court.

And after hearing oral argument by Mr. Dickerson, Attorney for Appellant, and by ———, Attorney for ———, it is further ordered by the court that this cause be now taken under advisement for final determination.

[fol. 9] STATE OF ILLINOIS, ss:

APPELLATE COURT, FOURTH DISTRICT

[Title omitted]

JUDGMENT—September 23, 1922

On this day come again the said parties, and the Court, having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid is there anything erroneous, vicious or defective, and that that record is no error; therefore, it is considered by the Court, that the motion heretofore made to reverse the judgment and remand [fol. 10] said cause for a new trial, be and the same is denied, and the motion heretofore made to affirm the judgment herein, is allowed; and it is therefore ordered by the Court that the Judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error, and that motion for procedendo be allowed.

And it is further considered by the Court, that the said Appellee recover of and from the said Appellant costs by it in this behalf expended, and that Appellee have execution therefor.

[fol. 11] APPELLATE COURT RECORD, FOURTH DISTRICT, OCTOBER
TERM

[Title omitted]

ORDER MODIFYING OPINION AND DENYING REHEARING

And now comes the appellant herein, by counsel, and presents to the Court a petition for rehearing in said cause, filed herein on October 23rd, A. D. 1922, and moves the Court to set aside the judgment herein entered and order procedendo; also for costs and for certified transcript of order and grant a rehearing in said cause in pursuance of the rules of this Court.

And the Court having considered said petition and motion, and being now sufficiently advised of and concerning the premises, it is ordered by the court, that the opinion filed herein on September 23rd, A. D. 1922, be and the same is hereby modified and refiled and that said motion be and the same is hereby denied.

[fol. 12] STATE OF ILLINOIS, SS:

APPELLATE COURT, FOURTH DISTRICT

[Title omitted]

JUDGMENT—Nov. 16, 1922

On this day come again the said parties, and the Court, having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid is there anything erroneous, vicious or defective, and that that record is no error; therefore, it is considered by the Court, that the motion heretofore made to reverse the judgment and remand said cause for a new trial, be and the same is denied, and the motion [fol. 13] heretofore made to affirm the judgment herein, is allowed; and it is therefore ordered by the Court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error, and that motion for procedendo be allowed.

And it is further considered by the Court, that the said Appellee recover of and from the said Appellant costs by it in this behalf expended, and that Appellee have execution therefor.

I, Robert B. Roe, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, do hereby certify that

the foregoing is a true, perfect and complete transcript of the record of proceedings in said cause of said Appellate Court, as truly taken and copied by me from the files and the records now on file and of record in my office.

In testimony whereof, I have set my hand and affixed the seal of said Appellate Court at Mt. Vernon, this sixteenth day of December, A. D. 1922.

Robert B. Roe, Clerk of the Appellate Court, by Fred Brendel,
Deputy. (Seal.)

[fol. 14] IN APPELLATE COURT, FOURTH DISTRICT

ASSIGNMENT OF ERRORS

Now comes the petitioner, Central Union Telephone Company, by Cutting, Moore & Sidley, Charles W. Terry and Charles E. Gueltig, its attorneys, and says that in the record and proceedings of the circuit court and appellate court in the above entitled cause there is manifest error, and assigns as errors the following:

1. The circuit court erred in holding as propositions of law in this case the propositions of law asked by the plaintiff and marked "Held" by the court, and each of them.

2. The circuit court erred in refusing to hold and mark as held each of the written propositions of law requested by the defendant and by the Court, marked "Refused."

3. The circuit court erred in finding the issues for the plaintiff.

4. The circuit court erred in holding the ordinance number 369 valid and constitutional.

5. The circuit court erred in holding ordinance number 369 applicable to the defendant to said suit.

6. The court erred in not holding ordinance number 369 unconstitutional as being in violation of section 10 of Article I of the Constitution of the United States of America.

7. The circuit court erred in not holding Ordinance Number 369 unconstitutional as in violation of the Fifth amendment to the Constitution of the United States of America.

8. The circuit court erred in not holding Ordinance Number 369 as void because contravening the constitution of the State of Illinois, and particularly Sections 2 and 14 of Article II of said Constitution.

[fols. 15 & 16] 9. The appellate court erred in affirming the judgment of the circuit court.

10. The appellate court erred in not reversing without remanding the judgment of the circuit court.

11. The appellate court erred in not reversing and remanding the judgment of the circuit court.

12. The appellate court erred in not holding ordinance Number 369 inapplicable to the Central Union Telephone Company.

13. The appellate court erred in not holding ordinance Number 369 unconstitutional as in violation of Section 10 of Article I of the Constitution of the United States of America, and as in violation of the Fifth Amendment to the Constitution of the United States of America, and as in violation of the Constitution of the State of Illinois and particularly Sections 2 and 14 of Article II of said Constitution.

14. The judgment of the circuit court of the Appellate Court is contrary to the law and the evidence.

15. The appellate court and the circuit court erred in entering judgment in favor of plaintiff and against the defendant in the trial court.

Wherefore, the Central Union Trust Company, defendant in the cause below, prays that the judgment of said circuit court and appellate court may be reversed.

Central Union Telephone Company, by Cutting, Moore & Sidley, Charles W. Terry, and Charles E. Gueltig, Attorneys for said Central Union Telephone Company. Cutting, Moore & Sidley, Charles W. Terry, Charles E. Gueltig, Attys. for said Central Union Telephone Co.

[fols. 17 & 18]

Exhibit "A"

STATE OF ILLINOIS, ss:

APPELLATE COURT, FOURTH DISTRICT

CLERK'S CERTIFICATE

I, Robert B. Roe, Clerk of the Appellate Court, within and for the Fourth District of said State, hereby certify that this is the Original Transcript of the record of said cause filed in said court on the third day of March, A. D., 1921 and on the sixteenth day of March, A. D. 1922.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Mt. Vernon, Illinois, this 22nd day of January, A. D. 1923.

Robert B. Roe, Clerk of the Appellate Court, by Fred Brendel, Deputy.

I, Robert B. Roe, Clerk of the Appellate Court, within and for the Fourth District of said State, hereby certify that this is the Original Transcript of the record of said cause filed in said court on the third day of March A. D. 1921.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court, at Mt. Vernon, Illinois, this 12th day of November, A. D. 1921.

Robert B. Roe, Clerk of Appellate Court, by Fred Brendel,
Deputy.

[fol. 19] IN THE CIRCUIT COURT OF MADISON COUNTY

[Title omitted]

DECLARATION—Filed May 16, 1919

The City of Edwardsville, a municipal corporation of the County of Madison and State of Illinois, plaintiff in this suit by George Lytle City Attorney, complains of the Central Union Telephone Company a corporation, defendant in this suit, who have been summoned to answer said complaint in a plea of debt.

For that whereas, on or before the 7th day of July 1914 and ever since the plaintiff was and still is an incorporated city, incorporated under the general laws of the State of Illinois and situated in the County of Madison and that since date had charge and control of the streets, alleys, sidewalks and public places within the corporate limits of said City.

And plaintiff avers that on the 7th day of July 1914 there was duly passed and approved and thereafter on the 10th day of July 1914 duly published an ordinance and from said last named date in force and effect and still continues to be in full force and effect as an ordinance of the City of Edwardsville known as Ordinance No. 369, requiring that any person, firm or corporation owning, controlling [fol. 20] or occupying any post or pole over eight feet high which may occupy any portion of any street, alley or sidewalk within the city of Edwardsville, Illinois, such post or pole being used to support any wires of whatsoever nature, or to support any sign or awning or display for the purpose of advertising, shall pay annually in the Treasury of said City fifty (50¢) cents for each pole or post owned, controlled, owned or occupied by said firm, person or corporation as compensation to the said City for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy. Which compensation by a provision of said Ordinance became due and payable on the first day of September of each year after the passage and approval of said Ordinance.

Plaintiff avers that said defendant, Central Union Telephone Company was the owner and in possession and control of and occupied a large number of poles and posts generally known as telephone posts carrying and supporting electric and telephone wires located

on the streets, sidewalks and public places in the City of Edwardsville and used in the conduct of the business of said Telephone Company, and that under and by a provision of said Ordinance the sum of fifty (50¢) cents became due and owing to the said City of Edwardsville on the first day of September of the year- 1914, 1915, 1916, 1917 and 1918 and each of said poles amounting to the total sum of to-wit Five Thousand (\$5,000.00) Dollars.

Whereby and by force of the statutes of the State of Illinois and the ordinance aforesaid an action is accrued to the plaintiff against the defendant for the sum of fifty (50¢) cents for each of said poles and posts for each of said years; yet the defendant although often requested has not paid the plaintiff the above last mentioned sum of money or any portion thereof but refused so to do to the damage of the plaintiff in the sum of Five Thousand (\$5,000.00) Dollars so therefore it brings suit, etc.

City of Edwardsville, by George A. Lytle, City Attorney.

[fol. 21] IN CIRCUIT COURT OF MADISON COUNTY

SUMMONS AND SHERIFF'S RETURNS—Filed May 16, 1919.

The People of the State of Illinois to the Sheriff of Said County,
Greeting:

We command you that you summon the Central Union Telephone Company, if it shall be found in your county, personally to be and appear before the circuit court of Madison County on the first day of the next term thereof, to be holden at the court house in Edwardsville, in Madison County, on the 26th day of May next, to answer unto The City of Edwardsville in a plea of Debt to the damage of said plaintiff as it says in the sum of Five Thousand Dollars, and have you then and there this Writ, with an endorsement thereon in what manner you have executed same.

Witness, John Mellon, Clerk of said Circuit Court, and the seal thereof, at his office in Edwardsville, in said County, this 16th day of May A. D. 1919.

John Mellon, Clerk, by Simon Kellerman, Jr., Deputy.

STATE OF ILLINOIS,

County of Madison, ss:

I have duly served the within writ upon The Central Union Telephone Company by reading the same and delivering a true copy thereof to Ed L. Lax, General Agent of the Central Union Telephone Company, the Pres., Sec. or any other superior officer of said Central Union Telephone Co. not found in my County for service, as I am therein commanded, this, the 16th day of May, A. D. 1919.

George E. Little, Sheriff, by Thos. Waugh, Deputy.

[fol. 22] IN THE CIRCUIT COURT OF MADISON COUNTY

[Title omitted]

GENERAL ISSUE AND SPECIAL PLEAS OF DEFENDANT—Filed June 9,
1919

And the defendant by E. S. Wilson and C. W. Terry, its attorneys, comes and defends the wrong and injury when, etc., and says that it does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above claimed against it and of this the defendant puts itself upon the country, etc.

E. S. Wilson & C. W. Terry, Attorneys for Defendant.

And for a further plea in this behalf the defendant says that it does not owe the said sum of money against it above demanded, or any part thereof, because it says that it is a public service corporation engaged in the furnishing and providing of means of communication by telephone to the citizens of Edwardsville and vicinity; that it is the successor to and as such has succeeded to all rights of the Central Telephone Company, which said Company was heretofore by an Ordinance of the said City of Edwardsville, said plaintiff, duly passed on the 5th day of July A. D. 1882 and approved on the 10th day of July A. D. 1882, granted the right to it and its successors and assigns, [fol. 23] in and upon the streets, sidewalks, alleys and public grounds of the City of Edwardsville, with the right to use the same and to erect and maintain and use all the necessary poles, or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use a system of telephones, or a telephone exchange in said city; that in and by said Ordinance it was further provided that the said Central Telephone Company, its successors and assigns, should maintain and use (under proper and reasonable restrictions and rules) an office and operator on lines of telephone wires, during the continuance of the enjoyments of the privileges in said Ordinance granted, at some convenient point in said city; that said Ordinance contained other provisions, all of which will more fully appear from the said Ordinance ready to be produced.

That said Ordinance was duly accepted by said Central Telephone Company and it entered upon the enjoyment of the rights thereunder and the performance of the duties and obligations as in and by said ordinance required; that upon this defendant succeeding to the rights of the said Central Telephone Company it has from that time likewise performed all the obligations by said ordinance imposed upon it to be performed, and that said defendant and said Central Telephone Company have in all things kept and performed and complied with the obligations in said Ordinance contained and upon it imposed from the date of the passage thereof until the date of the bringing of said suit and since; that on the 7th day of September 1897 the City Council of said City of Edwardsville, legally adopted a resolution in words and figures as follows:

"Resolved by the City Council of the City of Edwardsville Illinois, that the Central Union Telephone Company, as successor and assign of the Central Telephone Company, and now in possession of and constructing a Telephone Exchange in this City by virtue of an Ordinance [fol. 24] passed by the City Council on the 5th day of July, 1882, and approved by the Mayor on the 10th day of July, 1882, be requested to furnish to said city, for its business and use solely, and with exchange service, and without charge, so long as said company exercises unimpaired its rights under said ordinance, one (1) set of telephones to be placed where said city may by resolution designate, and any other additional telephones for city use as the city council by resolution may call for, at twenty-five per cent (25%) discount from the regular rates charged for business purposes and that for each of said telephones, separate contracts, containing the customary provisions shall be previously signed, having endorsed thereon the terms of payment herein provided; and the further right to attach without charge, to the top cross-arm of each of the poles erected by said company under said ordinance, the fire-alarm and police wires of said city.

Resolved further that said company be requested to file its written acceptance of this resolution in the office of the city clerk.

This certifies that the above resolution was passed by the city council of the City of Edwardsville, Sept. 7, 1897.

Edward Hagnauer, City Clerk. (Seal.)

And that thereafter on the 4th day of October 1897 the said defendant filed in the office of the City Clerk of the said City of Edwardsville its acceptance thereof in words and figures as follows:

[fol. 25]

Chicago, Sept. 27th, 1897.

To the Honorable Mayor and City Council, Edwardsville, Madison County, Illinois.

GENTLEMEN: The Central Union Telephone Company hereby accepts the resolution passed by you Sept. 7th, 1897, calling upon this company as successor of the Central Telephone Company, and now in possession of and constructing a telephone exchange in your city, by virtue of an ordinance passed July 5th, 1882 to furnish to your city certain telephone service and pole privileges therein specified and hereby files this, its unconditional acceptance thereof, in the office of your city clerk.

Respectfully, Central Union Telephone Co., (Signed) by W. A. Jackson, President.

Attest: (Signed) W. S. Chapman, Secretary. (Seal.)

As appears from the certificate of the City Clerk of said City to said acceptance attached, in words and figures as follows:

STATE OF ILLINOIS,
County of Madison,
City of Edwardsville, ss:

I, Edward Hagnauer, Clerk of said City of Edwardsville, Illinois, and keeper of the books, records and documents thereof, do hereby certify that said acceptance, of which the above and foregoing is a true copy, was filed in my office this 4th day of October, 1897.

Witness my hand and official seal this 4th day of October, 1897.
Edward Hagnauer, City Clerk. (Seal.)

[fol. 26] And that thereafter and from that time hitherto said defendant has not only complied with the obligations in said Ordinance No. 72 contained, but with the obligations and provisions of the said resolution and has furnished to the said City of Edwardsville without charge, a set of telephones placed as the said City has from time to time directed and has in addition furnished such additional telephones for City use as required by said City through its City Council at twenty-five (25%) per cent discount from the regular rates charged for business purposes and has entered into separate contracts with the said City for the furnishing of said telephones, and has also permitted the said City to attach without charge to its poles the fire alarm and police wires of the City, and that the said City has accepted of and has received from this defendant the said phones and phone service and use of its said poles for fire alarm and police wires and is still receiving said service and facilities and the benefits thereof, all without cost, charge or compensation, nor has it offered to refund the value thereof or any part thereof and is still demanding and receiving said facilities.

And this the defendant is ready to verify, wherefore it prays judgment if it ought to be charged with the said debt by virtue of the said supposed ordinance in said declaration mentioned, etc.

E. S. Wilson & C. W. Terry, Attorneys for Defendant.

And for a further plea in this behalf the defendant by its attorneys comes and defends, etc., and says that there is no record of the supposed ordinance or the passage thereof in the said declaration mentioned in manner and form as the plaintiff has above in its said declaration alleged.

And this the defendant is ready to verify wherefore it prays judgment if the plaintiff ought to have its aforesaid action against it.

E. S. Wilson & C. W. Terry, Attorneys for Defendant.

[fols. 27 & 28] IN THE CIRCUIT COURT OF MADISON COUNTY

[Title omitted]

DEMURRER TO SPECIAL PLEA—Filed October 11, 1919

And the plaintiff, as to the said plea of the defendant by it secondly above pleaded, says that the same and the matters and things therein

contained, in manner and form as the same are above pleaded, are not sufficient in law to bar it, the plaintiff, from having or maintaining its aforesaid action, and that it is under no duty of law to make answer thereto; and this it is ready to verify; wherefore for want of a sufficient plea in this behalf, the plaintiff prays judgment and its debt aforesaid together with its damages, etc. to be adjudged to it, etc.

City of Edwardsville, Plaintiff, by George A. Lytle, City Attorney.

[fols. 29 & 30] IN THE CIRCUIT COURT OF MADISON COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed November 28, 1919

On this day the court hears argument of counsel on the demurrer of the plaintiff to the special plea of the defendant and the court being now fully advised in the premises sustains said demurrer, to which action of the court in sustaining this demurrer defendant excepts.

[fol. 31] IN THE CIRCUIT COURT OF MADISON COUNTY

[Title omitted]

FIRST AMENDED SPECIAL PLEA—Filed January 12, 1920

And for a further plea in this behalf the defendant says that it does not owe the said sum of money against it above demanded, or any part thereof, because it says that it is a public service corporation engaged in the furnishing and providing of means of communication by telephone to the citizens of Edwardsville and vicinity; that it is the successor to and as such has succeeded to all rights of the Central Telephone Company, which said Company is the same Company named in an ordinance of the said City of Edwardsville, said plaintiff, and which said ordinance was duly passed on or about the 5th day of July A. D. 1882 and approved on or about the 10th day of July, A. D. 1882, and which said ordinance is in words and figures as follows:

Ordinance No. 72

An Ordinance Granting Permission to Erect and Maintain a System of Telephones, or a Telephone Exchange, in the City of Edwardsville, Madison County, Illinois

Section 1. Be it ordained by the City Council of the City of [fol. 32] Edwardsville, Illinois: That the Central Telephone Company, and its successors and assigns be, and they are hereby granted the right of way through, in and upon the streets, sidewalks, alleys

and public grounds of the City of Edwardsville in the County of Madison and State of Illinois, for the use and purposes of therein and thereon to erect, maintain and use all the necessary poles, or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use a system of telephones, or a Telephone Exchange in the City of Edwardsville, Illinois, aforesaid.

Provided, that the said Central Telephone Company, and its successors and assigns, shall maintain and use (under proper and reasonable restrictions and rules) an office and operator on lines of telephone wires, during the continuance of the enjoyments of the privileges herein granted, at some convenient point in said city, and shall so set poles, or posts, and place the wires thereon in such places and in such manner as not to interfere with travel on said streets, sidewalks, alleys and public grounds aforesaid, and shall put and keep in good order all those parts of the same interfered with or used in the erection of said poles or posts, and shall hereafter so maintain the same in like good order.

Section 2. Said poles shall be so set as not to interfere with the flow of water in any gutter or drain in said City, and the points of location shall be determined under the direction of the Street Commissioner or the City Civil Engineer.

Section 3. The said City Council expressly reserves the right to grant the right of way through, in and upon said streets, sidewalks, alleys and public grounds, for the erection, maintenance and use of the necessary poles or posts and wires of any telephone company, or [fol. 33] individuals, whenever requested, the same not to interfere with proper and successful use of the rights hereby granted to the said Central Telephone Company, and its successors and assigns.

Section 4. The City Council shall enact such ordinances as may be necessary for the protection of telephone poles, fixtures and wires against abuse and injury.

Passed in City Council July 5th, A. D. 1882. Approved July 10th, A. D. 1882.

John H. White, City Clerk.

Attest: A. Keller, Mayor. (Seal.)

STATE OF ILLINOIS,
Madison County, ss:

I hereby certify that the within instrument was this day duly recorded in said County in Book 125, page 316, this 21st day of October A. D. 1885, at 5:30 o'clock P. M.

Robt. Hagnauer, Clerk Cir. Court.

That upon the passage and approval of said ordinance same was accepted by said Central Telephone Company and it entered upon the enjoyment of the rights thereunder and the performance of the duties and obligations as in and by said ordinance required. That

upon this defendant succeeding to the rights of the said Central Telephone Company it has from that time likewise performed all [fol. 34] the obligations by said ordinance imposed upon it to be performed, and that said defendant and said Central Telephone Company have in all things kept and performed and complied with the obligations in said Ordinance contained and upon it imposed from the date of the passage thereof until the date of the bringing of said suit and since; That on the 7th day of September 1897 the City Council of said City of Edwardsville, legally adopted a resolution in words and figures as follows:

"Resolved by the City Council of the City of Edwardsville, Illinois, that the Central Union Telephone Company, as successor and assign of the Central Telephone Company and now in possession of and constructing a telephone exchange in this City by virtue of an ordinance passed by the City Council on the 5th day of July, 1882, and approved by the Mayor on the 10th day of July, 1882, be requested to furnish to said city, for its business and use solely, and with exchange service, and without charge, so long as said company exercises unimpaired its rights under said ordinance, one (1) set of telephones to be placed where said city may by resolution designate, and any other additional telephones for city use as the city council by resolution may call for, at twenty-five per cent (25%) discount from the regular rates charged for business purposes and that for each of said telephones, separate contracts, containing the customary provisions shall be previously signed, having endorsed thereon the terms of payment herein provided; and the further right to attach without charge, to the top cross-arm of each of the poles erected by said company under said ordinance, the fire-alarm and police wires of said city.

Resolved further that said company be requested to file its written acceptance of this resolution in the office of the city clerk.

[fol. 35] This certifies that the above resolution was passed by the City Council of the City of Edwardsville, Sept. 7, 1897.

Edward Hagnauer, City Clerk. (Seal.)"

And that thereafter on the 4th day of October 1897 the said defendant filed in the office of the City Clerk of the said City of Edwardsville its acceptance thereof in words and figures as follows:

Chicago, Sept. 27th, 1897.

To the Honorable Mayor and City Council, Edwardsville, Madison County, Illinois.

GENTLEMEN: The Central Union Telephone Company hereby accepts the resolution passed by you Sept. 7th, 1897, calling upon this company as successor of the Central Telephone Company, and now in possession of and constructing a telephone exchange in your city, by virtue of an ordinance passed July 5th, 1882 to furnish to

your city certain telephone service and pole privileges therein specified and hereby files this, its unconditional acceptance thereof, in the office of your city clerk.

Respectfully, Central Union Telephone Co., (signed) by
W. A. Jackson, President.

Attest: (Signed) W. S. Chapman, Secretary. (Seal.)

[fol. 36] As appears from the certificate of the City Clerk of said City to said acceptance attached, in words and figures as follows:

STATE OF ILLINOIS,

County of Madison,

City of Edwardsville, ss:

I, Edward Hagnauer, Clerk of said City of Edwardsville, Illinois, and keeper of the books, records and documents thereof, do hereby certify that said acceptance, of which the above and foregoing is a true copy, was filed in my office this 4th day of October, 1897.

Witness my hand and official seal this 4th day of October, 1897.

Edward Hagnauer, City Clerk. (Seal.)

And that thereafter and from that time hitherto said defendant has not only complied with the obligations in said Ordinance No. 72 contained, but with the obligations and provisions of the said resolution and has furnished to the said City of Edwardsville without charge, a set of telephones placed as the said City has from time to time directed and has in addition furnished such additional telephones for City use as required by said City through its City Council at twenty-five (25%) per cent discount from the regular rates charged for business purposes and has entered into separate contracts with the said City for the furnishing of said telephones, and has also permitted the said City to attach without charge to its poles the fire [fol. 37] alarm and police wires of the City, and that the said City has accepted of and has received from this defendant the said phones and phone service and use of its said poles for fire alarm and police wires and is still receiving said service and facilities and the benefits thereof, all without cost, charge or compensation, nor has it offered to refund the value thereof or any part thereof and is still demanding and receiving said facilities.

And this the defendant is ready to verify, wherefore it prays judgment if it ought to be charged with the said debt by virtue of the said supposed ordinance in said declaration mentioned, etc.

M. P. Turner, C. W. Terry, Attorneys for Defendant.

[fol. 38] IN CIRCUIT COURT OF MADISON COUNTY

SECOND SPECIAL PLEA—Filed Jan. 12, 1920

And for a further plea in this behalf the defendant says that it does not owe the said sum of money against it above demanded, or any

part thereof, because it says that it is a public service corporation engaged in the furnishing and providing of means of communication by telephone to the citizens of Edwardsville and vicinity; that it is the successor to and as such has succeeded to all rights of the Central Telephone Company, which said Company is the same Company named in an ordinance of the said City of Edwardsville, said plaintiff, and which said ordinance was duly passed on or about the 5th day of July, A. D. 1882 and approved on or about the 10th day of July A. D. 1882, and which said ordinance is set forth in words and figures in the first amended special plea above.

That said Central Telephone Company and this defendant, the Central Union Telephone Company as successor to said company, has since the passage of said ordinance performed all the obligations by the same imposed from the date thereof and from thence hitherto. That it is the same Company named in a certain resolution adopted by the City Council of the said City of Edwardsville on or about the 7th day of September A. D. 1897 and which resolution is the same resolution as set forth in words and figures in the said first amended special plea above, and which was thereafter accepted by it, said defendant, by its written acceptance set forth in full in said special plea above, and that it has since the passage thereof complied with all the provisions of said resolution on its part to be performed, and that said ordinance and said resolution by the acceptance thereof and the performance of the obligations therein contained, became thereby and was at the time of the passage of the said ordinance of the said [fol. 39] City of Edwardsville referred to in the declaration above mentioned, a valid and subsisting and binding contract between said city and said defendant and that therefore the said ordinance of said City of Edwardsville so referred to in said declaration in so far as it attempts to impose any additional tax or license fee upon said Company on account of the use of the streets of said city by its poles, is void as contravening the Constitution of the United States and particularly Section 10 of Article 1 thereof, which provides among other things as follows:

"No State shall * * * pass any law impairing the obligation of contracts," etc.

And this the defendant is ready to verify, wherefore it prays judgment if it ought to be charged with the said debt by virtue of the said supposed ordinance in said declaration mentioned, etc.

M. P. Turner, C. W. Terry, Attorneys for Defendant.

IN CIRCUIT COURT OF MADISON COUNTY

THIRD SPECIAL PLEA—Filed Jan. 12, 1920

And for a further plea in this behalf the defendant says that it does not owe the said sum of money against it above demanded, or any part

thereof, because it says that it is a public service corporation engaged in the furnishing and providing of means of communication by telephone to the citizens of Edwardsville and vicinity; that it is the successor to and as such has succeeded to all rights of the Central Telephone Company, which said Company is the same Company named in an ordinance of the said City of Edwardsville, said plaintiff, and which said ordinance was duly passed on or about the 5th day [fol. 40] of July A. D. 1882 and approved on or about the 10th day of July, A. D. 1882, and which said ordinance is set forth in words and figures in the first amended special plea above.

That said Central Telephone Company and this defendant, the Central Union Telephone Company as successor to said company, has since the passage of said ordinance performed all the obligations by the same imposed from the date thereof and from thence hitherto. That it is the same Company named in a certain resolution adopted by the City Council of the said City of Edwardsville on or about the 7th day of September, A. D. 1897 and which resolution is the same resolution as set forth in words and figures in the said first amended special plea above, and which was thereafter accepted by it, said defendant, by its written acceptance set forth in full in said special plea above, and that it has since the passage thereof complied with all the provisions of said resolution on its part to be performed, and that said ordinance and said resolution by the acceptance thereof and the performance of the obligations therein contained, became thereby and was at the time of the passage of the said ordinance of the said City of Edwardsville referred to in the declaration above mentioned, a valid and subsisting and binding contract between said city and said defendant and that therefore the said ordinance of said City of Edwardsville so referred to in said declaration in so far as it attempts to impose any additional tax or license fee upon said Company on account of the use of the streets of said city by its poles, is void as contravening the Constitution of the United States and particularly the fifth amendment thereto which provides among other things as follows:

"No person shall, * * * be deprived of life, liberty or property without due process of law."

And this the defendant is ready to verify, wherefore it prays judgment if it ought to be charged with the said debt by virtue of the said [fol. 41] supposed ordinance in said declaration mentioned, etc.

M. P. Turner, C. W. Terry, Attorneys for Defendant.

IN CIRCUIT COURT OF MADISON COUNTY

FOURTH SPECIAL PLEA—Filed Jan. 12, 1920

And for a further plea in this behalf the defendant says that it does not owe the said sum of money against it above demanded, or any part thereof, because it says that it is a public service corporation

engaged in the furnishing and providing of means of communication by telephone to the citizens of Edwardsville and vicinity; that it is the successor to and as such has succeeded to all rights of the Central Telephone Company, which said Company is the same Company named in an ordinance of the said City of Edwardsville, said plaintiff, and which said ordinance was duly passed on or about the 5th day of July A. D. 1882 and approved on or about the 10th day of July, A. D. 1882, and which said ordinance is set forth in words and figures in the first amended special plea above.

That said Central Telephone Company and this defendant, the Central Union Telephone Company as successor to said company, has since the passage of said ordinance performed all the obligations by the same imposed from the date thereof and from thence hitherto. That it is the same Company named in a certain resolution adopted by the City Council of the said City of Edwardsville on or about the 7th day of September, A. D. 1897 and which resolution is the same [fol. 42] resolution as set forth in words and figures in the said first amended special plea above, and which was thereafter accepted by it, said defendant, by its written acceptance set forth in full in said special plea above, and that it has since the passage thereof complied with all the provisions of said resolution on its part to be performed, and that said ordinance and said resolution by the acceptance thereof and the performance of the obligations therein contained, became thereby and was at the time of the passage of the said ordinance of the said City of Edwardsville referred to in the declaration above mentioned, a valid and subsisting and binding contract between said city and said defendant and that therefore the said ordinance of said City of Edwardsville so referred to in said declaration in so far as it attempts to impose any additional tax or license fee upon said Company on account of the use of the streets of said city by its poles, is void as contravening the Constitution of the State of Illinois and particularly Sections two and fourteen of Article Two of said Constitution.

And this the defendant is ready to verify, wherefore it prays judgment if it ought to be charged with the said debt by virtue of the said supposed ordinance in said declaration mentioned, etc.

M. P. Turner, C. W. Terry, Attorneys for Defendant.

[fol. 43] IN THE CIRCUIT COURT OF MADISON COUNTY

DEMURRER TO FIRST AMENDED SPECIAL PLEA—Filed Jan. 15, 1920

And the plaintiff, as to the said, First Amended Special Plea of the defendant by it above pleaded, says that the same and the matters and things therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar it, the plaintiff, from having or maintaining its aforesaid action, and that it is under no duty of law to make answer thereto; and this it is ready to verify; Wherefore for want of a sufficient plea in this behalf,

the plaintiff prays judgment and its debt aforesaid, together with its damages, etc. to be adjudged to it, etc.

City of Edwardsville, Plaintiff, by George A. Lytle, City Attorney.

[fols. 44-46] IN THE CIRCUIT COURT OF MADISON COUNTY

DEMURRER TO SECOND, THIRD, AND FOURTH SPECIAL PLEAS—
Filed Jan. 15, 1920

And the plaintiff, as to the second, third and fourth special pleas of the defendant above pleaded, says that the said pleas and the matters and things therein contained in each and all of them, are not sufficient in law to bar it, the plaintiff, from having or maintaining its aforesaid action, and that it is under no duty of law to make answer thereto; and this it is ready to verify; Wherefore for want of sufficient pleas in this behalf the plaintiff prays judgment and its debt aforesaid, together with its damages, etc., to be adjudged to it, etc.

City of Edwardsville, Plaintiff, by George A. Lytle, City Attorney.

[fols. 47 & 48] IN THE CIRCUIT COURT OF MADISON COUNTY

ORDER SUSTAINING DEMURRERS—JUNE 23, 1920

On this day the court hears argument of counsel on the demurrers of the plaintiff to the first amended special plea and the second, third and fourth special pleas of the defendant and the court being now fully advised in the premises sustains said demurrers, to which action of the court in sustaining these demurrers defendant excepts.

On to-wit: October 8, 1920, said cause was continued and the May Term 1920 of this court adjourned to court in course.

[fol. 49] IN THE CIRCUIT COURT OF MADISON COUNTY

SUBMISSION OF CAUSE—Oct. 18, 1920

On this day the plaintiff and defendant appeared by their respective attorneys and expressly waived trial by jury and agreed to submit the cause to the court for decision without a jury, and filed a written stipulation and agreement as to the facts involved in this case. And the plaintiff and defendant in said cause having submitted propositions of law and the court having heard the argument of counsel and having considered the stipulation of facts in this cause and the propositions of law proposed by the respective parties, the court takes said cause under advisement.

[fol. 50] IN THE CIRCUIT COURT OF MADISON COUNTY

JUDGMENT—Entered Oct. 30, 1920

On this day the court having considered the evidence, the argument of counsel and having marked "held" or "refused" the propositions of law submitted, and the court being now fully advised in the premises, finds the issues for the plaintiff and that the defendant is indebted to the plaintiff in the sum of \$3,000.00. And thereupon it is considered and adjudged by the court that the plaintiff do have and recover of and from the defendant the sum of \$3,000.00 and enters judgment in favor of the plaintiff and against the defendant for the sum of \$3,000.00 and costs of suit. To which action of the court in finding the issues for the plaintiff and against the defendant and in entering judgment against the defendant, the defendant excepts and prays an appeal to the Appellate Court, Fourth District of the State of Illinois. Appeal allowed on entering into bond in the sum of \$4,000.00 to be approved by the Clerk within 30 days of this day. Bill of exceptions to be presented within 90 days.

[fol. 51] IN THE CIRCUIT COURT OF MADISON COUNTY

[Title omitted]

Bill of Exceptions—Filed in said Circuit Court Nov. 12, 1920

[fol. 52] STIPULATION OF FACTS

And now comes the City of Edwardsville, Illinois, by George Lytle, City Attorney, and the defendant Central Union Telephone Company by C. W. Terry, its attorney and in order to avoid the costs, expense and time of calling witnesses to testify to the following facts and the formal proof thereof, it is hereby stipulated that the following are the facts in said cause.

1. That the City of Edwardsville is a municipal corporation, in the County of Madison aforesaid, organized under the General Incorporation Act of the State of Illinois.

2. That in July 1882 the City Council of said City of Edwardsville passed and the Mayor thereof approved Ordinance Number 72, in words and figures as follows, to-wit:

Ordinance No. 72

An Ordinance Granting Permission to Erect and Maintain a System of Telephones, or a Telephone Exchange, in the City of Edwardsville, Madison County, Illinois.

Section 1. Be it ordained by the City Council of the City of Edwardsville, Illinois: That the Central Telephone Company, and

its successors and assigns be, and they are hereby granted the right of way through, in and upon the streets, sidewalks, alleys and pub- [fol. 53] lie grounds of the City of Edwardsville in the County of Madison and State of Illinois, for the use and purposes of therein and thereon to erect, maintain and use all the necessary poles, or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use a system of Telephones, or a Telephone Exchange in the City of Edwardsville, Illinois, aforesaid.

Provided, that the said Central Telephone Company, and its successors and assigns, shall maintain and use (under proper and reasonable restrictions and rules) an office and operator on lines of telephone wires, during the continuance of the enjoyments of the privileges herein granted, at some convenient point in said city, and shall so set poles, or posts, and place the wires thereon in such places and in such manner as not to interfere with travel on said streets, sidewalks, alleys and public grounds aforesaid, and shall put and keep in good order all those parts of the same interfered with or used in the erection of said poles or posts, and shall hereafter so maintain the same in like good order.

Section 2. Said poles shall be so set as not to interfere with the flow of water in any gutter or drain in said City, and the points of location shall be determined under the direction of the Street Commissioner or the City Civil Engineer.

Section 3. The said City Council expressly reserves the right to grant the right of way through, in and upon said streets, sidewalks, alleys and public grounds, for the erection, maintenance and use of the necessary poles or posts and wires of any telephone company, or individuals, whenever requested, the same not to interfere with proper and successful use of the rights hereby granted to the said Central Telephone Company, and its successors and assigns. [fol. 54] Section 4. The City Council shall enact such ordinances as may become necessary for the protection of telephone poles, fixtures and wires against abuse and injury.

Passed in City Council July 5th, A. D. 1882.

Approved July 10th, A. D. 1882.

John H. White, City Clerk.

Attest: A. Keller, Mayor.

That upon the passage and approval of said ordinance the same was accepted by the said Central Telephone Company and it entered upon the enjoyment of the rights thereunder and in the performance of the duties and obligations as in and by said ordinance required. That on the 21st day of October, 1885 it caused a certified copy of said ordinance to be duly recorded in Madison County in book 125 at page 316 of the Recorder's Office of Madison County, Illinois.

3. That thereafter and prior to September 1897 the Central Telephone Company named in said ordinance conveyed and assigned all

its rights and powers granted to it by the said Ordinance Number 72 to the defendant Central Union Telephone Company by virtue of which assignment said defendant succeeded to the rights of the said Central Telephone Company and thereupon performed all of the obligations by said ordinance imposed upon it to be performed; that thereafter on to-wit: the 7th day of September 1897 the City Council of said City of Edwardsville legally adopted a resolution in words and figures as follows, to-wit:

"Resolved by the City Council of the City of Edwardsville, Illinois, that the Central Union Telephone Company, as successor and assign of the Central Telephone Company, and now in possession of and constructing a telephone exchange in this City by virtue of an ordinance passed by the City Council on the 5th day of July, 1882, and approved by the Mayor on the 10th day of July, 1882, be re-[fol. 55] quested to furnish to said city, for its business and use solely, and with exchange service, and without charge, so long as said company exercises unimpaired its rights under said ordinance, one (1) set of telephones to be placed where said city may by resolution designate, and any other additional telephones for city use as the city council by resolution may call for, at twenty-five per cent (25%) discount from the regular rates charged for business purposes and that for each of said telephones, separate contracts, containing the customary provisions shall be previously signed, having endorsed thereon the terms of payment herein provided; and the further right to attach without charge, to the top cross-arm of each of the poles erected by said company under said ordinance, the fire-alarm and police wires of said city.

Resolved further that said company be requested to file its written acceptance of this resolution in the office of the city clerk."

And that thereafter on the 4th day of October 1897 the said defendant filed in the office of the City Clerk of the said City of Edwardsville its acceptance thereof in words and figures as follows:

Chicago, Sept. 27th, 1897.

To the Honorable Mayor and City Council, Edwardsville, Madison County, Illinois.

GENTLEMEN: The Central Union Telephone Company hereby accepts the resolution passed by you Sept. 7th, 1897, calling upon this company as successor of the Central Telephone Company, and now in possession of and constructing a telephone exchange in your city, by virtue of an ordinance passed July 5th, 1882 to furnish to your city certain telephone service and pole privileges therein specified and hereby files this, its unconditional acceptance thereof, in the office of your city clerk.

[fol. 56] Respectfully, Central Union Telephone Co., (Signed) by
W. A. Jackson, President.

Attest: (Signed) W. S. Chapman, Secretary. (Seal.)

And that thereafter and from that time hitherto the said City of Edwardsville has requested and the defendant has furnished to said City without charge a telephone placed in the City Building for use by the City without charge and has in addition thereto furnished such additional telephones for City use as required by said City through its City Council at 25% discount from the regular rates charged for business purposes and has entered into separate contracts with the said City for the furnishing of said telephones and has also permitted the said City to attach without charge to its poles, the police signal wires of the said City and that said City has accepted of and has received from said defendant the said phones and phone service and the use of its said poles for police wires and is still receiving such service and facilities all as provided by said resolution and is still receiving the same continuously and without discontinuance.

4. That the City Council of the City of Edwardsville on to-wit, the 7th day of July 1914 duly adopted the following ordinance, to-wit:

Ordinance No. 369

An Ordinance Fixing the Compensation to be Paid the City by Persons, Firms, and Corporation- Owning, Controlling, or Occupying Posts or Poles in the Streets, Alleys, or Sidewalks.

Be it ordained by the City Council of the City of Edwardsville, Illinois.

Section 1. That any person, firm or corporation owning, controlling or occupying any post or pole over 8 ft. high which may occupy any portion of any street alley or sidewalk within the city of Edwardsville, Ill., such post or pole being used to support electric [fol. 57] or other wires of whatsoever nature, or to support any sign or awning, display for the purpose of advertising, shall pay annually into the Treasury of said City the sum of .50¢ for each pole, or post owned, controlled or occupied by said firm, person or corporation as compensation to the said City for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy.

Section 2. The said compensation hereinbefore provided for in section 1 of this ordinance shall become due and payable on the first day of September of each year after the passage and approval of this ordinance.

Section 3. That where said pole or post is owned, controlled or occupied by two or more persons, firm or corporations said persons, firms or corporations owning, controlling or occupying said pole or post may collectively pay the said sum of fifty cents for the pole or post so occupied by them in common, and in no instance shall more than fifty cents per annum be exacted as compensation for the use of a street, alley or sidewalk by any one pole.

Section 4. This ordinance shall be in full force and effect ten days from and after its passage, approval and legal publication, and shall be known and numbered as Ordinance No. 369 of the City of Edwardsville, Illinois.

Passed by the City Council, and approved by the mayor of the City of Edwardsville and deposited in the office of the City Clerk of the said City this 7th day of July A. D. 1914.

Approved:

D. H. Mudge, Mayor.

Attest: Edw. Hobson, City Clerk.

[fol. 58] Which said ordinance was duly passed by the City Council and approved by the Mayor of said City on the 7th day of July 1914 and was thereafter legally published in the Edwardsville Republican a newspaper published in said City of Edwardsville on the 10th day of July 1914.

5. And that the said Ordinance No. 72 and the said resolution and the said Ordinance No. 369 aforesaid have ever since the adoption thereof continued in full force and effect and have never been revoked, repealed, cancelled or amended.

6. That the defendant Central Union Telephone Company owns, controls and occupies 1,000 telephone posts or poles over 8 feet high on the public streets, alleys or sidewalks within the corporate limits of the City of Edwardsville, Illinois, and has so owned, controlled and occupied the same and used the same to support its telephone wires continuously from the 7th day of July 1914 to the time of the bringing of this suit and still owns and occupies the same; that the defendant Central Union Telephone Company has not paid nor offered to pay, but has refused to pay the sum of .50¢ for each of said poles per annum or any portion thereof and has not paid any of the payments required to be paid the City of Edwardsville by the provisions of said ordinance for the said telephone poles or either of them so occupying the public streets, alleys or sidewalks in said City of Edwardsville, Illinois.

7. It is further stipulated and agreed that a jury be waived and that this cause be submitted to the court without a jury but that either side may submit such other evidence on the trial of said cause as it may desire upon questions of fact not covered by these stipulations.

[fol. 59] 8. It is further stipulated that the assessed value of defendant's property within the City of Edwardsville is \$25,980, that the basis of assessing property in Madison County is to take same at 70% of its full value which would make the full value thereof \$37,000.

City of Edwardsville, Plaintiff, by George A. Lytle, City Attorney. Central Union Telephone Co., Defendant, by C. W. Terry, Its Attorney.

The foregoing was all the evidence introduced on the trial of this cause.

PLAINTIFF'S PROPOSITIONS OF LAW

And thereupon, the plaintiff, by its attorney, submitted to the court and asked it to hold as law in the decision of this case and to mark thereon the word "Held," the following written propositions:

(1) The Court holds the law to be that Ordinance No. 72, in this case, is not a contract ordinance, but is a mere permission or license on conditions; that no consideration is expressed therein nor contractual relation arising therefrom.

(Held.)

(2) The Court holds that by the resolution of September 7, 1897 and its acceptance, the rights of the defendant under Ordinance No. 72 were not limited nor affected; that the defendant, by the acceptance of said resolution, furnished the service and gave the right therein mentioned simply on request; that it was under no [fol. 60] legal obligation to furnish such service nor give such right under the terms of Ordinance No. 72, and therefore the passage and acceptance of said resolution created no contract for the use of the streets, sidewalks and alleys of the City which would prevent the passage and enforcement of the terms of Ordinance No. 369.

(Held.)

(3) The Court holds that there is no expression in Ordinance No. 72 of a consideration moving to the City for the right to occupy the streets, sidewalks, alleys and public grounds as mentioned in said ordinance, and therefore the City has a right to demand and collect the compensation provided for in Ordinance No. 369 for the use of the streets alleys and sidewalks of the City, and, that under the stipulation as to the number of poles in this case, the defendant is indebted to the plaintiff in the sum of \$3,000.

(Held.)

(4) The Court holds that by the passage and acceptance of the Resolution of September 7, 1897, the City Council merely requested and the defendant furnished certain service and gave a right to the City which the defendant was under no obligation to furnish or give under the terms of Ordinance No. 72; and therefore the furnishing by the defendant of the service and the giving of the right referred to in said resolution is not in consideration for the occupation of the streets, sidewalks and alleys of the City by the defendant, and therefore the City has the right by ordinance to require the defendant

to pay a reasonable compensation for the occupation of the streets, alleys and sidewalks by its poles.

(Held.)

(5) The Court holds the law to be, that under the stipulation of facts in this case, there is no contract between the plaintiff and defendant arising by and under Ordinance No. 72 and the Resolution referring to said ordinance, and the acceptance of said resolution by [fol. 61] the defendant, and its acts thereafter, that would deprive the right of the City of Edwardsville to enact Ordinance No. 369 and make same applicable to the defendant.

(Held.)

(6) The Court holds the law to be, that there has been no contravening the Constitution of the United States, nor that of the State of Illinois, in the enactment, passage and enforcement of Ordinance No. 369 aforesaid, as against the defendant.

(Held.)

(7) The Court holds the law to be that an ordinance cannot be amended or repealed or suspended by resolution, and therefore that the request made and the rights or privileges granted in the Resolution of September 7, 1897, cannot be added to and made a part of Ordinance No. 72 of July 5, 1882.

(Held.)

And the Court held the said propositions of law and marked the same "Held." To which action of the Court in holding said propositions as law in the decision of this case and in marking thereon the word "Held" the defendant by its attorney then and there excepted.

DEFENDANT'S PROPOSITIONS OF LAW

And thereupon the defendant by its attorney submitted to the Court and asked the Court to hold as law in the decision of this case and to mark thereon the word "Held" the following written propositions:

1. The Court holds the law to be that where a contract ordinance has been accepted by the grantee of rights thereunder it becomes a special contract binding upon the parties thereto.

(Held.)

[fol. 62] 2. The Court holds the law to be that when a special ordinance conflicts with a general ordinance, the former controls.

(Held.)

And the Court held the said propositions of law and marked the same "Held". To which action of the Court in holding said propositions as law in the decision of this case and in marking thereon the word "Held" the plaintiff by its attorney then and there accepted.

And the defendant by its attorney at the same time submitted to the Court and asked it to hold as law in the decision of this case and to mark thereon the word "Held" the following written propositions:

1. The Court holds the law to be that by the acceptance of Ordinance No. 72 the same became a contract between the grantee therein and the City of Edwardsville and later between the defendant and said city and that the city by the passage of a later ordinance cannot impair the obligation of such contract.

(Refused.)

2. The Court holds the law to be that Ordinance No. 369 being a general ordinance and being in conflict with Ordinance No. 72 that Ordinance No. 72 controls.

(Refused.)

3. The Court holds the law to be that by special ordinance No. 72 and by the resolution adopted by the City Council of Edwardsville September 7, 1897 and accepted by the Central Union Telephone Company on October 4, 1897, that the City of Edwardsville became bound by the provisions of said ordinance and said resolution and that the rentals provided to be paid by ordinance 369 can therefore not be collected from said defendant.

(Refused.)

[fol. 63] 4. The Court holds the law to be that under Ordinance No. 72 and the resolution of September 7, 1897 accepted by the defendant, and by reason of the City thereafter and hitherto having requested of the defendant and the defendant having furnished said city without charge, the telephone service as in said ordinance specified and having permitted the city to attach to its poles without charge the police signal wires of said city and the receiving of other services of the defendant in accordance with and pursuant to the terms of said resolution, and having received the benefit of said service from thence to the time of the commencement of this suit and since, that the City of Edwardsville is estopped from collecting any other or greater compensation from the defendant or any other rental for the poles occupied by the company.

(Refused.)

5. The Court holds the law to be that the rentals provided by ordinance No. 369 cannot be collected, as such ordinance is not a police

regulation and to allow the collection of such rentals would be to impair the obligations of the defendant company's contract.

(Refused.)

6. The Court holds the law to be that under the contract between the plaintiff and defendant arising by and under ordinance No. 369 and the resolution referring to said ordinance and the acceptance of said resolution and the performance of the terms and conditions of said ordinance and said resolution and the investment made by the defendant in said city and the placing of the 1,000 poles upon the streets of said City pursuant to said contract between it and said city, that said ordinance No. 369 in so far as it seeks to impose additional burdens or to collect additional moneys or [fol. 64] services from said defendant, is void.

(Refused.)

7. The Court holds the law to be that under the said contract between the parties arising under the facts of this case, that said Ordinance No. 369 is void as contravening the Constitution of the United States and particularly Section 10 of Article 1 thereof, which provides among other things that "no State shall * * * pass any law impairing the obligation of a contract."

(Refused.)

8. The Court holds the law to be that under the said contract between the parties arising under the facts of this case, that said Ordinance No. 369 is void as contravening the Constitution of the United States and particularly the Fifth Amendment thereto, which provides among other things that "no person shall be deprived of life, liberty or property without due process of law."

(Refused.)

9. The Court holds the law to be that under the said contract between the parties arising under the facts of this case, that the said Ordinance No. 369 is void as contravening the Constitution of the State of Illinois, and particularly sections 2 and 14 of Article 2 of said Constitution.

(Refused.)

10. The Court holds the law to be that it is immaterial that the word "consideration" does not appear in Ordinance No. 72. That it is apparent from said ordinance that a consideration for the granting of the rights therein was that the grantee therein should maintain an office and operator on its lines of telephone poles during the continuance and enjoyment of the privileges granted by said ordinance at a convenient point in said city and that this is sufficient consideration for the granting of said ordinance.

(Refused.)

11. The Court holds the law to be that even though the plaintiff by its council might prior to the passage, acceptance and performance of the terms and conditions of the resolution of September 7, 1897 have imposed other conditions. That the provision in said resolution that the defendant should furnish the police telephone and exchange service without charge as in said resolution specified so long as said company exercises unimpaired its rights under said ordinance (Ordinance No. 72), not only estops the plaintiff from demanding other compensation, but constitutes a contract between the parties which was not changed by ordinance No. 369.

(Refused.)

12. The Court holds the law to be that the resolution of September 7, 1897 and the performance of the conditions thereof in itself constituted a complete contract between the City of Edwardsville and the defendant until the same was expressly repealed and until the City should no longer accept the benefits thereof.

(Refused.)

13. The Court holds the law to be that the City of Edwardsville not having repealed the resolution of September 7, 1897 and still accepting the benefits thereof is barred from demanding without the consent of the defendant, any further compensation or rentals for the use of its streets by said defendant.

(Refused.)

But the Court refused to hold the said propositions, and each of them, as law in the decision of the case, and to mark thereon the word "Held", and marked thereon the word "Refused", to which [fol. 66] action of the court in refusing to hold each of said propositions as law in the decision of the case, and in refusing to mark thereon the word "Held," and in marking thereon the word "Refused", the defendant, by its attorney, then and there excepted.

And thereupon, the court found the issues for the plaintiff and against the defendant and rendered judgment against the defendant; in the sum of \$3,000.00 and costs of suit, to which decision of the court in finding the issues for the plaintiff and against the defendant, and in rendering judgment against the defendant, the defendant, by its attorney, then and there duly excepted and prayed an appeal to the Appellate Court, Fourth District of the State of Illinois. Appeal allowed on entering into bond in the sum of \$4,000.00 to be approved by the Clerk within 30 days of this date. Bill of exceptions to be presented within 90 days.

ORDER SETTLING BILL OF EXCEPTIONS

And forasmuch, as the matters above set forth do not fully appear of record, the defendant, by its attorneys, tenders this its bill of ex-

ceptions and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made; which is done accordingly this 12th day of November A. D. 1920.

J. F. Gillham, One of the Judges of the Third Judicial District of the State of ——. (Seal.)

[fols. 67-71] BOND ON APPEAL FOR \$4,000—Approved and filed November 12, 1920; omitted in printing

[fol. 72] STATE OF ILLINOIS,
Madison County, ss:

CLERK'S CERTIFICATE TO BILL OF EXCEPTIONS

I, John Mellon, Clerk of the Circuit Court of Madison County, in the State aforesaid, and the Keeper of Records and Seal of said Court, do hereby certify that the above and foregoing is a true, perfect and complete copy of Bill of exceptions, all papers filed and proceedings had in a certain cause lately pending in said Court, on the law side thereof, wherein City of Edwardsville was Plaintiff and Central Union Telephone Company was Defendant and now a matter of record in our said court.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court, at Edwardsville, this 10th day of December A. D. 1920.

John Mellon, Clerk, by ———, Deputy. (Seal.)

[fols. 73 & 74] IN MADISON CIRCUIT COURT

ASSIGNMENT OF ERRORS

Now comes the defendant and appellant, Central Union Telephone Company, a corporation, by Cutting, Moore & Sidley, and Charles W. Terry and Charles E. Gueltig, its attorneys, and says that in the record and proceedings of the Circuit Court in the above entitled cause there is manifest error, and assigns as errors the following:

1. The Circuit Court erred in sustaining plaintiff's demurrer to defendant's First Amended Special Plea, Second Special Plea, Third Special Plea and Fourth Special Plea, or any one or more of them.

2. The Circuit court erred in refusing to hold the matters and things set up in the special pleas of defendant as a complete defense.

3. The Circuit Court erred in holding as propositions of law in this case, the propositions of law asked by plaintiff and marked "Held" by the Court and each of them.

4. The Circuit Court erred in holding as the law in this case, plaintiff's proposition Number Three offered by the plaintiff and marked "Held" by the Court, and especially to the holding that defendant is indebted to plaintiff in the sum of \$3,000.00.

5. The Circuit Court erred in refusing to hold and mark as "Held" each of the written propositions of law requested by defendant and by the court marked "Refused."

6. The Circuit Court erred in finding the issues for the plaintiff.

7. The finding and holding of the Court that the defendant is indebted to the plaintiff in the sum of \$3,000.00 is not supported by the evidence and is contrary to the stipulation of facts in this case.

8. The judgment is contrary to the law and evidence in this case.

9. The finding and holding of the court and the judgment in this case is excessive.

10. The Circuit Court erred in entering judgment in favor of plaintiff and against the defendant.

11. The Circuit Court erred in entering judgment in favor of plaintiff and against the defendant in the sum of \$3,000.00.

Wherefore appellant (defendant below) prays that the judgment of said Circuit Court may be reversed.

Respectfully submitted, Cutting, Moore & Sidley, Charles W. Terry, Charles E. Tuelitig, Attorneys for Appellant. Cutting Moore & Sidley, Charles W. Terry, Charles E. Guelitig.

[fols. 75 & 76] IN SUPREME COURT OF ILLINOIS

[Title omitted]

SUBMISSION OF CAUSE

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that Plaintiff in Error hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said Defendant in Error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this

Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 77]

IN SUPREME COURT OF ILLINOIS

OPINION—Filed Oct. 20, 1923

Mr. JUSTICE CARTER delivered the opinion of the court:

This case involves an ordinance of the city of Edwardsville passed on July 7, 1914, imposing an obligation to pay fifty cents annually to the city for each pole or post over eight feet high occupying any portion of a street, alley or sidewalk, and used to support wire or to support signs or awnings or to display for the purpose of advertising. The telephone company, the plaintiff in error here, occupies the streets by virtue of an ordinance of 1882 granting permission to erect and maintain poles for the operation of a telephone system. This ordinance was supplemented by a resolution of the city council bearing date of September 7, 1897, requesting the telephone company to furnish certain service to the city without charge and certain additional service at a discount. The resolution of 1897 was accepted by the company.

This case has previously been before this court in *City of Edwardsville v. Central Union Telephone Co.* 302 Ill. 362. The case had been transferred to this court by the Appellate Court for the Fourth District on the ground that the Appellate Court had no jurisdiction of the case. Issues then presented to the Appellate Court involved, among others, constitutional questions, but this court held, in conformity with the established rule, that the question of constitutionality was waived by taking the appeal to the Appellate Court and by assigning errors in that court which it had jurisdiction to hear and determine. We then held that the case was improperly transferred to this court and transferred the case back to the Appellate Court for the Fourth District. The case is now here on certiorari to review the decision of the Appellate Court for the Fourth District.

There is but one issue involved. Does the ordinance of 1914, imposing an annual charge upon poles, apply to this company? The Appellate Court held the ordinance applicable. All constitutional issues have been waived by taking an appeal to the Appellate Court, and such issues are not proper for consideration here.

The plaintiff in error argues that the decision of the Appellate Court is wrong, basing this argument primarily upon two grounds: [fol. 78] (1) That the ordinance of 1914 is general in its terms and should be construed as excluding from its operation any charge upon the poles erected by the company under the specific authority of the ordinance of 1882; and (2) that to construe the ordinance of 1914 as

applicable to this company would violate the terms of a contract claimed to exist under the ordinance of 1882 as supplemented by the resolution of 1897, and that wherever possible constructions should be adopted to avoid the unconstitutionality of an ordinance.

By the ordinance of 1882 this company has the right to occupy the streets of the city of Edwardsville with poles for telephone service. The resolution of 1897, agreed to by the company, requesting that the company render certain services to the city, did not extend the rights of the company under the ordinance of 1882 but is argued to be a consideration by the company to the city for rights exercised under the grant of 1882, though it is urged at the same time that consideration is not material. Under the facts it is apparently the case that the company was in a position to grant or decline the request of 1897 without affecting its rights under the ordinance of 1882, though we do not regard this as material. As we said in *City of Springfield v. Interstate Telephone Co.* 279 Ill. 324, on page 327: "When the privilege of the use of a street is granted by an ordinance which is accepted and acted upon by the grantee it becomes a contract binding upon the city, from which it cannot recede."

Under the first point suggested above,—that is, plaintiff in error's contention that the general language of the ordinance of 1914 is controlled by and an exception read into it by the ordinance of 1882, supplemented by the resolution of 1897,—it is argued that the issue involved has been decided in favor of plaintiff in error by *City of Springfield v. Interstate Telephone Co.* supra. As we read that case it does not decide the question here at issue. In that case there was an ordinance of August 5, 1901, levying a charge upon poles similar to that here involved. There was a later ordinance of December 9, 1901, granting to the company the right to establish a telephone system and erect poles therefor and expressly specifying certain services to be performed for the right so granted. The terms of the later ordinance were properly construed to exempt the company from the application of the earlier ordinance on the ground that the later ordinance was a special one making an exception to the provisions of an earlier general ordinance. The court in that case said that the ordinance of August 5, 1901, levying a charge upon poles, was not the exercise of a governmental power but the exercise of the proprietary power of the city. The earlier ordinance had imposed a general charge upon poles in the exercise of the city's proprietary powers, and a later specific grant to the telephone company had made an exception to the earlier general ordinance by specifying a different compensation for the grant so made. There the earlier general ordinance expressed a consideration for the right to occupy the streets in a certain way, and a later ordinance expressed a new and different consideration for a specific right to occupy the streets in the same way by the telephone company. Here, an early ordinance (that of 1882) granted the telephone company the right to occupy the streets without the expression of a consideration therefor. A later resolution (that of 1897) requested the company to perform certain services, which the company was apparently

in a position to grant or refuse. In the earlier specific grant in the case now before the court, even as supplemented by the resolution of 1897, there is no definite expression of consideration for the occupancy of the streets. and the language of the general ordinance of 1914 by its terms provides that the charge upon poles shall be paid by "any person, firm or corporation owning, controlling or occupying any post or pole over eight feet high which may occupy any portion of any street, alley or sidewalk within the city of Edwardsville, Illinois, such post or pole being used to support electric or other wires of whatsoever nature, or to support any sign or awning, display for the purpose of advertising," etc.

Rules of construction are an aid to the determination of the intent of the legislative body,—not a means of defeating that intent,—when clearly expressed. In the Springfield case, *supra*, the rule that a particular provision controls a general provision was properly applied because of the circumstances indicating such an intention. The fact that the specific grant designating a consideration was subsequent to the general ordinance in that case made this intention clear, though this statement is not to be construed as an expression of the view that a particular provision must be subsequent to the general order to be construed as an exception thereto. In the present case not only is the specific grant to the company earlier than the general ordinance but it expresses no consideration. Neither the specific grant of 1882 nor the resolution of 1897 constitutes a definite expression of consideration, which, as a matter of construction, **takes** this company out from under the language of the 1914 ordinance imposing a charge or consideration for the occupancy of the streets by poles. To so hold would run counter to what seems to be the clear intent of the language of the ordinance of 1914. In the Springfield case, *supra*, there was an express consideration in a general ordinance, replaced by an express consideration in a special grant. Here we are asked to read what is urged to be an implied consideration in a special grant as an exception to an express consideration in a later general ordinance. This goes beyond the province of construction.

We express no opinion as to whether the language of the ordinance of 1914, construed in accordance with its clear intent, constitutes a violation of the obligation of a contract established by the grant of 1882, supplemented by the resolution of 1897. That is a constitutional issue, waived by taking the case to the Appellate Court. The language of a grant to the company may be sufficient to create a valid contract and at the same time insufficient, as a matter of construction, to constitute an exception to the ordinance of 1914. Reading the two ordinances together in the Springfield case, the specific constitutes an exception to the general. Reading the ordinance of 1914 with the grant of 1882 and the resolution of 1897, we cannot discover a specific consideration constituting an exception to the general ordinance here. Summarizing as briefly as possible, the distinction is, that the Springfield case directly involved the application of a construction harmonizing an earlier and a later or-

dinance. The present case involves a direct conflict between an earlier and a later ordinance which cannot be resolved merely by construction but might have presented a constitutional issue.

The other point presented by plaintiff in error is, as we understand it, that the ordinance of 1914 should be construed so as to except plaintiff in error therefrom, because to construe it in this manner will avoid a construction under which the ordinance of 1914 would be partially unconstitutional as impairing the obligation of a contract or as depriving the company of property without due process of law. If, as we have intimated above, the ordinance of 1914 by its terms applies to this company, the rule of construction to avoid [fol. 81] unconstitutionality cannot be applied so as to defeat the purpose so expressed; for this rule of construction is also an aid in determining intent,—not a means of defeating such intent. Not only this, but the issue of construction thus presented is so close to the constitutional issue already waived by plaintiff in error that a decision in its favor, if based in terms on the question of construction, would, in fact, chiefly depend upon the constitutional issue, for the court must determine that there is a constitutional issue in order to adopt a rule of construction avoiding such issue. A construction excepting the company from the terms of the 1914 ordinance in order to avoid possible unconstitutionality would be identical in result to holding the ordinance partially invalid upon the constitutional ground waived in this case, and a decision in favor of plaintiff in error on this ground alone would, in effect, recognize by indirection a constitutional claim waived by an appeal to the Appellate Court.

The judgment of the Appellate Court is affirmed.
Judgment affirmed.

[fol. 82]

IN SUPREME COURT OF ILLINOIS

JUDGMENT—Entered Oct. 20, 1923

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Judgment of the Appellate Court aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Defendant in Error recover of and from the said Plaintiff in Error costs by it in this behalf expended, to be taxed, and that it have execution therefor.

[fols. 83 & 84] SUPREME COURT OF ILLINOIS

CLERK'S CERTIFICATE

I, Charles W. Vail, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of: City of Edwardsville, Defendant in Error, vs. Central Union Telephone Company, Plaintiff in Error, No. 15225 and also of the Opinion of the Court rendered therein, as the same now appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 9th day of February, A. D. 1924.

Chas W. Vail, Clerk Supreme Court. (Seal of the Supreme Court, State of Illinois.

[fol. 85] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Jan. 22, 1924

To the Honorable William M. Farmer, Chief Justice of the Supreme Court of Illinois, and to the other Justices of said Honorable Court:

The Petition of Central Union Telephone Company for a Writ of Error to Supreme Court of Illinois

Your petitioner, Central Union Telephone Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, respectfully shows:

1. Heretofore, and on or about the 16th day of May, 1919, an action was commenced in the Circuit Court of Madison County, Illinois, by the City of Edwardsville, Illinois, a municipal corporation, against your petitioner. The declaration filed May 16, 1919, in that action alleged in substance. (Rec. 19.)

[fol. 86] That City of Edwardsville, a municipal corporation in the County of Madison and State of Illinois, on and before the 7th day of July, 1914, was and ever since has been an incorporated city, incorporated under the general laws of the State of Illinois, having charge and control of streets, alleys, sidewalks and public places within the corporate limits of said city.

That on the 7th day of July, 1914, an ordinance was duly passed and approved, and the same still continues to be in full force and effect as an ordinance of the City of Edwardsville, known as Ordinance No. 369, requiring any person, firm or corporation owning, controlling or occupying any post or pole over eight feet high which

may occupy any portion of any street, alley or sidewalk within the City of Edwardsville, Illinois, such post or pole being used to support any wires of whatsoever nature, or to support any sign or awning or display for the purpose of advertising, shall pay annually in the treasury of said city fifty cents for each pole or post owned, controlled, owned or occupied by said firm, person or corporation as compensation to the said city for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy. Which compensation by a provision of said ordinance became due and payable on the first day of September of each year after the passage and approval of said ordinance.

That said defendant, Central Union Telephone Company was the owner and in possession and control of and occupied a large number of poles and posts generally known as telephone posts carrying and supporting electric and telephone wires located on the streets, sidewalks and public places in the City of Edwardsville.

And that under and by provision of said ordinance the sum of fifty cents became due and owing to the said City of Edwardsville on [fol 87] the first day of September of the years 1914, 1915, 1916, 1917 and 1918 on each of said poles amounting to the total sum of, to wit, \$5,000.

2. Your petitioner filed a plea of the general issue and four special pleas to the said declaration. In the first amended plea the defendant averred in substance (Rec. 31):

That defendant does not owe the said sum of money or any part thereof because it is a public service corporation engaged in the furnishing of and providing means of communication by telephone to the citizens of Edwardsville and vicinity; that it is the successor to and as such has succeeded to all rights of the Central Telephone Company, which said company is the same company named in an ordinance of the said City of Edwardsville, said plaintiff, and which said ordinance was duly passed on or about the 5th day of July, A. D. 1882, and approved on or about the 10th day of July, A. D. 1882, and which said ordinance is in words and figures as follows:

Ordinance No. 72

An Ordinance Granting Permission to Erect and Maintain a System of Telephones, or a Telephone Exchange

Section 1. Be it ordained by the City Council of the City of Edwardsville, Illinois: That the Central Telephone Company, and its successors and assigns be, and they are hereby granted the right-of-way through, in and upon the streets, sidewalks, alleys and public grounds of the City of Edwardsville in the County of Madison and State of Illinois, for the use and purposes of therein and thereon to erect, maintain and use all the necessary poles, or posts of wood, iron or other suitable materials, and the necessary wires successfully to operate and use a system of telephones, or a telephone exchange in the City of Edwardsville, Illinois, as aforesaid.

Provided, that the said Central Telephone Company, and its successors and assigns, shall maintain and use (under proper and reasonable restrictions and rules) an office and operator or line of telephone wires, during the continuance of the enjoyments of the privileges herein granted, at some convenient point in said city, and shall so set poles, or posts, and place the wires thereon in such places and in such manner as not to interfere with travel on said streets, sidewalks, alleys and public grounds aforesaid, and shall put and keep in good order all those parts of the same interfered with or used in the erection of said poles or posts, and shall hereafter so maintain the same in like good order.

Sec. 2. Said poles shall be so set as not to interfere with the flow of water in any gutter or drain in said city, and the points of location shall be determined under the direction of the street commissioner of the city civil engineer.

Sec. 3. The said city council expressly reserves the right to grant the right-of-way through, in and upon said streets, sidewalks, alleys and public grounds, for the erection, maintenance and use of the necessary poles or posts and wires of any telephone company, or individuals, whenever requested, the same not to interfere with proper and successful use of the rights hereby granted to the said Central Telephone Company, and its successors and assigns.

Sec. 4. The city council shall enact such ordinances as may be necessary for the protection of telephone poles, fixtures and wires against abuse and injury."

That upon the passage and approval of said ordinance same was accepted by said Central Telephone Company and it entered upon the enjoyment of the rights thereunder and the performance of the duties and obligations as in and by said ordinance required. That upon this defendant succeeding to the rights of the said Central Telephone Company it has from that time likewise performed all the obligations by said ordinance imposed upon it to be performed, and that said defendant and said Central Telephone Company have in all things kept and performed and complied with the obligations in [fol. 89] said ordinance contained and upon it imposed from the date of the passage thereof until the date of the bringing of said suit and since; that on the 7th day of September, 1897, the city council of said City of Edwardsville, legally adopted a resolution in words and figures as follows:

"Resolved, by the City Council of the City of Edwardsville, Illinois, that the Central Union Telephone Company, as successor and assign of the Central Telephone Company, and now in possession of and constructing a telephone exchange in this city by virtue of an ordinance passed by the city council on the 5th day of July, 1882, and approved by the mayor on the 10th day of July, 1882, be requested to furnish, to said city, for its business and use solely, and with exchange service, and without charge, so long as said company exercises unimpaired its rights under said ordinance, one (1) set of

telephones to be placed where said city may by resolution designate, and any other additional telephones for city use as the city council, by resolution, may call for, at twenty-five per cent (25%) discount from the regular rates charged for business purposes and that for each of said telephones, separate contracts, containing the customary provisions shall be previously signed, having endorsed thereon the terms of payment herein provided; and the further right to attach without charge to the top cross arm of each of the poles erected by said company under said ordinance, the fire alarm and police wires of said city.

Resolved, further, that said company be requested to file its written acceptance of this resolution in the office of the city clerk."

And that thereafter on the 4th day of October, 1897, the said defendant filed in the office of the city clerk of the said City of Edwardsville its acceptance thereof.

And that thereafter and from that time hitherto said defendant has not only complied with the obligations in said Ordinance No. 72 contained, but with obligations and provisions of the said resolution and has furnished to the said City of Edwardsville without charge, a set of telephones placed as the said city has from time to time directed [fol. 90] and has in addition furnished such additional telephones for city use as required by said city through its city council at twenty-five per cent discount from the regular rates charged for business purposes and has entered into separate contracts with the said city for the furnishing of said telephones, and has also permitted the said city to attach without charge to its poles the fire alarm and police wires of the city, and that the said city has accepted of and has received from this defendant the said phones and phone service and use of its said poles for fire alarm and police wires and is still receiving said service and facilities and the benefits thereof, all without cost, charge or compensation, nor has it offered to refund the value thereof or any part thereof and is still demanding and receiving said facilities.

The second special plea (Rec. 38) incorporates by reference the various allegations and ordinances contained in the first plea and concludes with the charge that "said ordinance and said resolution by the acceptance thereof and the performance of the obligations therein contained, became thereby and was at the time of the passage of the said ordinance of the said City of Edwardsville referred to in the declaration above mentioned, a valid and subsisting and binding contract between said city and said defendant and that therefore the said ordinance of said City of Edwardsville so referred to in said declaration in so far as it attempts to impose any additional tax or license fee upon said company on account of the use of the streets of said city by its poles, is void as contravening the Constitution of the United States and particularly Section 10 of Article I thereof, which provides among other things as follows:

"No state shall * * * pass any law impairing the obligation of contracts," etc.

[fol. 91] In the fourth special plea the defendant alleged that the ordinance of 1882 of the City of Edwardsville contravened the Constitution of the State of Illinois, and particularly Sections 2 and 14 of Article 2 thereof.

3. At the trial of said cause the parties submitted to the Court the following stipulation of facts, which was all the evidence introduced in the trial of said cause (Rec. 52) :

1. That the City of Edwardsville is a municipal corporation, in the County of Madison aforesaid, organized under the General Incorporation Act of the State of Illinois.

2. That in July, 1882, the city council of said City of Edwardsville passed and the mayor thereof approved ordinance No. 72, identical with said ordinance No. 72, set up in the plea of your petitioner above quoted.

That upon the passage and approval of said ordinance the same was accepted by the said Central Telephone Company and it entered upon the enjoyment of the rights thereunder and in the performance of the duties and obligations as in and by said ordinance required. That on the 21st day of October, 1885, it caused a certified copy of said ordinance to be duly recorded in Madison County, in Book 125, at page 316, of the recorder's office of Madison County, Illinois.

3. That thereafter and prior to September, 1897, the Central Telephone Company named in said ordinance conveyed and assigned all its rights and powers granted to it by the said ordinance No. 72 to the defendant, Central Union Telephone Company by virtue of which assignment said defendant succeeded to the rights of the said Central Telephone Company and thereupon performed all of the obligations by said ordinance imposed upon it to be performed; that thereafter, [fol. 92] on, to wit, the 7th day of September, 1897, the city council of said City of Edwardsville legally adopted a resolution identical with the resolution set up in the plea of your petitioner above quoted.

And that thereafter, on the 4th day of October, 1897, the said defendant filed in the office of the city clerk of the City of Edwardsville its acceptance thereof, in words and figures as follows:

"Chicago, Sept. 27th, 1897.

To the Honorable Mayor and City Council, Edwardsville, Madison County, Illinois.

GENTLEMEN: The Central Union Telephone Company hereby accepts the resolution passed by you September 7, 1897, calling upon this company, as successor of the Central Telephone Company, and now in possession of and constructing a telephone exchange in your city, by virtue of an ordinance passed July 5, 1882, to furnish to your city certain telephone service and pole privileges therein specified,

and hereby files this, its unconditional acceptance thereof, in the office of your City Clerk.

Respectfully, Central Union Telephone Co., (Signed) by W. A. Jackson, President.

Attest: (Signed) W. S. Chapman, Secretary. (Seal.)"

And that thereafter and from time to time hitherto the said City of Edwardsville has requested and the defendant has furnished to said city without charge a telephone placed in the city building for use by the city without charge and has in addition thereto furnished such additional telephones for city use as required by said city through its city council at twenty-five per cent discount from the regular rates charged for business purposes and has entered into separate contracts [fol. 93] with the said city for the furnishing of said telephone and has also permitted the said city to attach without charge to its poles, the police signal wires of the said city and that said city has accepted of and has received from said defendant the said phones and phone service and the use of its said poles for police wires and is still receiving such service and facilities all as provided by said resolution and is still receiving the same continuously and without discontinuance.

4. That the city council of the City of Edwardsville on, to wit, the 7th day of July, 1914, duly adopted the following ordinance, to wit:

"Ordinance No. 369

An Ardinance Fixing the Compensation to be Paid the City by Persons, Firms and Corporations Owning, Controlling, or Occupying Posts or Poles in the Streets, Alleys, or sidewalks

Be it ordained by the City Council of the City of Edwardsville:

Section 1. That any person, firm or corporation owning, controlling or occupying any post or pole over eight feet high which may occupy any portion of any street, alley or sidewalk within the City of Edwardsville, Illinois, such post or pole being used to support electric or other wires of whatsoever nature, or to support any sign or awning, display for the purpose of advertising, shall pay annually into the treasury of said city the sum of fifty cents for each pole, or post owned, controlled or occupied by said firm, person or corporation as compensation to the said city for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy.

Sec. 2. The said compensation hereinbefore provided for in Section 1 of this ordinance shall become due and payable on the first day of September of each year after the passage and approval of this ordinance.

[fol. 94] Sec. 3. That where said pole or post is owned, controlled or occupied by two or more persons, firms or corporations, said persons, firms or corporations owning, controlling or occupying said

pole or post may collectively pay the said sum of fifty cents for the pole or post so occupied by them in common, and in no instance shall more than fifty cents per annum be exacted as compensation for the use of a street, alley or sidewalk by any one pole.

Sec. 4. This ordinance shall be in full force and effect ten days from and after its passage, approval and legal publication, and shall be known and numbered as Ordinance No. 369 of the City of Edwardsville, Illinois."

5. And that the said Ordinance No. 72 and the said resolution and the said Ordinance No. 369 aforesaid have ever since the adoption thereof continued in full force and effect and have never been revoked, repealed, canceled or amended.

6. That the defendants, Central Union Telephone Company owns, controls and occupies 1,000 telephone posts or poles over eight feet high on the public streets, alleys or sidewalks within the corporate limits of the City of Edwardsville, Illinois, and has so owned, controlled and occupied the same and used the same to support its telephone wires continuously from the 7th day of July, 1914, to the time of the bringing of this suit and still owns and occupies the same; that the defendant Central Union Telephone Company, has not paid nor offered to pay, but has refused to pay the sum of fifty cents for each of said poles per annum or any portion thereof and has not paid any of the payments required to be paid the City of Edwardsville by the provisions of said ordinance for the said telephone poles or either of them so occupying the public streets, alleys or sidewalks in said City of Edwardsville, Illinois.

[fol. 95] 7. It is further stipulated and agreed that a jury be waived and that this cause be submitted to the Court without a jury, but that either side may submit such other evidence on the trial of said cause as it may desire upon questions of fact not covered by these stipulations.

8. It is further stipulated that the assessed value of defendant's property within the City of Edwardsville is \$25,980, that the basis of assessing property in Madison County is to take same at 70% of its full value which would make the full value thereof \$37,000.

IV. Upon the trial the defendant submitted to the Court and asked it to hold as law in the decision of the case, among others, the following written propositions of law (Rec. 64):

"The Court holds the law to be that under the said contract between the parties arising under the facts of this case, that said Ordinance No. 369 is void as contravening the Constitution of the United States and particularly Section 10 of Article I thereof, which provides among other things that 'no state shall * * * pass any law impairing the obligation of a contract.'"

But the Court refused to hold the said proposition as law in the decision of the case and to mark thereon the word "Held," but

marked the word "Refused" thereon, to which action the defendant by its attorney duly excepted.

Thereupon the Court found the issues for the plaintiff and rendered judgment against the defendant as follows (Rec. 50) :

"The Court having considered the evidence and argument of counsel, and having marked 'held' or 'refused' the propositions of law submitted, and the Court being now fully advised in the premises, finds the issues for the plaintiff and that the defendant is indebted [fol. 96] to the plaintiff in the sum of \$3,000. And thereupon it is considered and adjudged by the Court that the plaintiff do have and recover of and from the defendant the sum of \$3,000 and enters judgment in favor of the plaintiff and against the defendant for the sum of \$3,000 and costs of suit."

From the said judgment of the trial Court the defendant duly perfected an appeal to the Appellate Court of the Fourth District of Illinois. Among the assignment of errors in that court the defendant duly assigned the following (Rec. 73) :

"1. The Circuit Court erred in sustaining plaintiff's demurrer to defendant's first amended special plea, second special plea, third special plea and fourth special plea, or any one or more of them.

2. The Circuit Court erred in refusing to hold the matters and things set up in the special pleas of defendant as a complete defense.

5. The Circuit Court erred in refusing to hold and mark as 'held' each of the written propositions of law requested by defendant and by the Court marked 'refused.' "

On October 25, 1921, the Appellate Court aforesaid entered an order transferring the cause to the Supreme Court of the State of Illinois, giving as a reason for its action that a constitutional question was involved. On February 22, 1922, the Supreme Court of the State of Illinois entered an order transferring the cause back to the Appellate Court of the Fourth District of the State of Illinois, stating as a reason for this action the following :

"This case, therefore, does not present a question relating to revenue and it does not involve a franchise or freehold. The validity of the ordinance is challenged on the ground that it is unconstitutional, but this question was waived by taking the appeal to the Appellate Court and by assigning errors in that court which it had jurisdiction to hear and determine.

[fol. 97] (Indiana Milliners' Fire Ins. Co. v. People, 170 Ill. 474; Case v. City of Sullivan, 222 id. 56; Armour & Co. v. Industrial Board, 275 id. 328; Drtina v. Chadles Tea Co., 281 id. 259.)"

That your petitioner thereupon filed a certain petition for rehearing before said Supreme Court of the State of Illinois in which it was asserted that rights claimed under the Constitution of the United

States could not be waived, and that by the provision of Article VI of said Constitution of the United States, the same was binding upon said Court, anything in the state law or Constitution to the contrary notwithstanding, as shown by a true and correct copy of said petition for rehearing, duly certified by the clerk of said Court, hereto attached and made a part hereof. That upon said petition for rehearing coming on to be heard before said Court, the same was denied and the opinion therefore filed in this cause as above quoted was adhered to.

On September 23, 1922, the Appellate Court aforesaid entered an order affirming the judgment of the trial Court and on November 16, 1922, entered an order denying the petition for a rehearing and again affirming the judgment of the trial Court. (Rec. 12.)

A petition for a writ of certiorari was duly granted by the Supreme Court of the State of Illinois on February 19, 1923. Among the assignment of errors in the Supreme Court the defendant duly assigned the following (Rec. 14):

"2. The Circuit Court erred in refusing to hold and to mark as held each of the written propositions of law requested by the defendant and by the Court, marked 'refused.'

6. The Court erred in not holding ordinance Number 369 unconstitutional as being in violation of Section 10 of Article I of the Constitution of the United States of America.

[fol. 98] 8. The Circuit Court erred in not holding Ordinance Number 369 as void because contravening the Constitution of the State of Illinois, and particularly Sections 2 and 14 of Article II of said Constitution.

13. The Appellate Court erred in not holding Ordinance Number 369 unconstitutional as in violation of Section 10 of Article I of the Constitution of the United States of America, and as in violation of the Fifth Amendment to the Constitution of the United States of America, and as in violation of the Constitution of the State of Illinois and particularly Sections 2 and 14 of Article II of said Constitution."

The Supreme Court on October 20, 1923, affirmed the decision of the trial Court. In its opinion it held that the ordinance No. 72 of the City of Edwardsville was applicable to the plaintiff in error. In regard to the constitutional question the Court says (Rec. 77):

"This case has previously been before this Court in *City of Edwardsville v. Central Union Telephone Co.*, 302 Ill. 362. The case had been transferred to this court by the Appellate Court for the Fourth District on the ground that the Appellate Court had no jurisdiction of the case. Issues then presented to the Appellate Court involved, among others, constitutional questions, but this Court held, in conformity with the established rule, that the question of constitutionality was waived by taking the appeal to the Appellate Court and by assigning errors in that court which it had jurisdiction to hear and determine. We then held that the case was improperly transferred

to this court and transferred the case back to the Appellate Court for Fourth District. The case is now here on certiorari to review the decision of the Appellate Court for the Fourth District."

V. Your petitioner further shows that the judicial code of the United States provides in substance that a final judgment in the highest court of a state where "is drawn in question the validity of [fol. 99] a statute of or an authority exercised under any state" on the ground of their being repugnant to the "Constitution of the United States and the decision is in favor of their validity," the same may be reexamined and reversed or affirmed by the Supreme Court of the United States upon writ of error; that the validity of said pole tax ordinance above referred under the Federal Constitution has been in this cause "drawn in question" by this petitioner by appropriate pleas, requests for the holding of various propositions of law and assignments of error.

VI. The statute of the State of Illinois relating to appeals from a trial court to a court of review, set forth in Cabill's Rev. Stat. 1923, Chap. 110, Sec. 118, which has been in force at all times during the pendency of this cause and makes the following provisions:

"Appeals from and writs of error to Circuit Courts, the Superior Court of Cook County, and the Criminal Court of Cook County, County Courts and City Courts, in all criminal cases below the grade of felony, shall be taken directly to the Appellate Court, and in all criminal cases above the grade of misdemeanors and cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved; and in cases in which the validity of a municipal ordinance is involved and in which the trial Judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the state is interested, as a party or otherwise, shall be taken directly to the Supreme Court."

As your petitioner is informed and believes and therefore states the fact to be that the decisions of the State of Illinois cited in the opinion of the Supreme Court quoted above hold that under this statute a question under the Constitution of the State of Illinois is waived by taking an appeal to the Appellate Court and assigning errors in that court which it had jurisdiction to hear and determine; [fol. 100] no decision expressly holds that a question under the Constitution of the United States of America is thus waived. While the decision of the Supreme Court of Illinois in this case is necessarily to that effect, nevertheless it does not expressly so hold; the result is that the Supreme Court of Illinois, by a rule now for the first time applied, has deprived your petitioner of the opportunity of having reviewed by an Appellate Court of the State of Illinois the judgment of a trial Court upholding the validity of said pole tax ordinance, when its validity was drawn in question in accordance with the practice required by the laws of the State of Illinois, on the ground of its repugnancy to the Constitution of the United States.

Your petitioner further shows that the said statute of the State

of Illinois above quoted in this Article VI refers only to questions arising under the constitution of the State of Illinois and that if the same refers to questions under the Federal Constitution, then the same is void as being in conflict with the provisions of Article VI of the Constitution of the United States which provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Your petitioner further shows that said statute cannot in any way affect or limit the jurisdiction of the Supreme Court of the United States as conferred by the laws of the United States.

VII. Your petitioner further shows that said decisions and judgments of said courts and judges, and each of them, impair the obligations of the contract between your petitioner and the City of [fol. 101] Edwardsville, Illinois, as evidenced by said Ordinance No. 72 and said resolution of 1897, in violation and in contravention of Section 10, of Article I, of the Constitution of the United States, and deny to your petitioner the protection thereof; in such decisions and each of them there is drawn in question the validity of an ordinance of the City of Edwardsville, State of Illinois, and of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States; and the said decision and each of them is in favor of the validity of said ordinance and statute.

Wherefore your petitioner prays that a writ of error may issue, and that it may be allowed to bring up for review before the Supreme Court of the United States the said order of the said courts of Illinois; and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

Central Union Telephone Company, by J. Dwight Dickerson,
Its Agent. Charles S. Cutting, Nathan G. Moore, Wm. P.
Sidley, Wm. D. Bangs, Petitioner's Attorneys, 11 South
La Salle Street, Chicago, Illinois.

[fol. 102] STATE OF ILLINOIS,
County of Fayette, ss:

J. Dwight Dickerson, being first duly sworn, deposes and says that he is the agent of Central Union Telephone Company, the petitioner in the foregoing petition, and duly authorized by it to make this affidavit in its behalf; that the foregoing petition is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to those matters he believes the same to be true.

J. Dwight Dickerson.

Sworn to before me this 17th day of January, 1924. H. J.
Gochenour, Notary Public. (Seal H. J. Gochenour, Notary
Public, Fayette County, Ills.)

[fols. 103 & 104] IN SUPREME COURT OF ILLINOIS

ORDER ALLOWING WRIT OF ERROR

The above and foregoing petition was this day presented to me, together with a bond, citation and assignment of errors. The petition for said writ of error is hereby allowed, the citation issued, and the bond in the penal sum of Five Thousand Dollars, with American Surety Company as surety, is hereby approved.

William M. Farmer, Chief Justice of the Supreme Court of the State of Illinois.

January 17, 1924.

[fol. 105]

SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed Mar. 20, 1922

Now comes Central Union Telephone Company, the appellant in the above entitled cause, by Cutting, Moore and Sidley, its attorneys, pursuant to notice to the clerk and official reporter of this court heretofore given in accordance with the rules of this court, and applies for a rehearing in the above entitled cause, wherein this Court filed its opinion on February 22, 1922, transferring the said cause to the Appellate Court of Illinois in and for the Fourth District.

In the course of that opinion, this Court said:

“The validity of the ordinance is challenged on the ground that it is unconstitutional, but this question was waived by taking the appeal to the Appellate Court and by assigning errors in that court which it had jurisdiction to hear and determine.”

[fol. 106] The statutory provision upon which this opinion is based, is Section 118 of the Practice Act of Illinois, which reads as follows:

“Appeals from and writs of error to Circuit Courts, the Superior Court of Cook County, the Criminal Court of Cook County, County Courts and City Courts, in all cases below the grade of felony, should be taken directly to the Appellate Court, and in all criminal cases above the grade of misdemeanors and cases in which a franchise or freehold or the validity of a statute or a construction of the Constitution is involved, and in cases in which the validity of a municipal ordinance is involved, and in which the trial judge shall certify that in his opinion the public interests so require, and in all cases relating to revenue or in which the state is interested as a party or otherwise, shall be taken directly to the Supreme Court.”

Without attempting any argument that the present case does not involve any question of the "construction of the Constitution" but only whether a certain ordinance of the City of Edwardsville violated provisions of the Constitutions, both of Illinois and of the United States, all of which provisions are so well defined that any construction of them is impossible, or, at the most, only frivolous, we are pointing out that the case does involve the validity of a municipal ordinance only, and is a case in which the trial judge has not certified that the public interests require an appeal directly to this Court. Our principal aim is to show that the Court has, in said sentence above quoted, misapprehended the law, due, no doubt, to the fact that no motion to transfer the case has been made or any argument submitted at any time in any court as to whether the appeal should go directly to this Court or to the Appellate Court, in so far as the Constitution of the United States is involved. The question is also one of first impression both in Illinois and so far as we can ascertain in any court in the Union.

[fol. 107] It should be noted that the propositions of law were submitted by the present appellant, and refused by the court below, claiming that the so-called pole tax ordinance was void as contravening the Constitution of the United States, both as impairing the obligation of a contract and as depriving the appellant of its property without due process of law. (Abst. 28, 29.) Appropriate errors were assigned to raise the same points (Abst. 32; Error 5) in the Appellate Court.

The statute requires that a case, in which is involved "a construction of the Constitution" should be taken directly to this Court. The question immediately arises as to what constitution is meant.

In the first place, only one constitution is spoken of in this section. It does not speak of a construction of any constitution, but only of the Constitution, nor does it say "cases in which constitutional questions are involved"; but only cases in which a construction of the Constitution is brought in question.

The article "the" has been defined both in dictionaries and in judicial decisions. Webster defines it as, "A demonstrative word used especially before a noun to particularize its meaning, having a force thus distinguished from the indefinite distributive force of 'a,' 'an,' and from the abstract of force of the unqualified noun. Thus, the man, points to a particular man, as distinguished from a man and from the generic man."

This Court, in *People v. McCormick*, 261 Ill. 413, 417, said:

"The words used are, 'the board of county commissioners.' The definite particle 'the' is a demonstrative word which particularizes the noun before which it stands and limits its meaning more definitely and particularly than the indefinite particle 'a.' The board of county commissioners' refers to a more definite conception than 'a board of county commissioners,' * * *."

[fol. 108] In *Succession of Dupre*, 116 La. 1090, 41 So. 324, 326, the Supreme Court of Louisiana said:

"That this act No. 31 was intended to cover the whole subject-matter there can be no room for doubt. It says so expressly in its title: 'An act providing for the manner of adopting children.' 'The' manner; not a manner, or one of the manners, or part of the manner; but 'the' manner; i. e., the exclusive manner."

In *State v. Campbell*, 210 Mo. 202, 109 S. W. 706, 712, the Supreme Court of Missouri said:

"In the use of the definite article 'the' immediately preceding 'state' in the conclusion prescribed by the Constitution, we have pointed out the state whose peace and dignity has been offended, and by the omission of such definite article we have a conclusion that does not designate the power or authority against which the offense is committed. 'The state,' in the conclusion prescribed by the Constitution of this state, means the State of Missouri, and this, in substance, was what was decided in the *Hays Case*, 78 Mo. 600, heretofore cited."

In the case of *Wastl v. Montana Union Railway Co.*, 24 Mont. 159, 61 Pac. 9, 15, the Supreme Court of Montana said:

"Applying these principles to test the instruction complained of, we must conclude that appellant's position is correct. The jury are told that, though the plaintiff was negligent, he was not precluded from a recovery unless his negligence was the proximate cause of the injury. The use of the article 'the' with its specifying and particularizing force, as opposed to the indefinite article 'a,' which should have been used, excludes the idea of any other concurring cause. The article 'the,' in the sense in which it is here employed, designates one particular from a class or number, disassociating it from others of the same class. Attention is thus called to the particular object singled out of the class, and thus individualized. The [fol. 109] indefinite 'a,' used in place of it, would have meant 'one' or 'one of' the class, or, in this instance, one of the two contributing causes."

To the same effect is *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, and *Palmer v. Kellogg*, 77 Mass. 27; and *United States v. Hudson*, 65 Fed. 68.

The statute is one passed by the Legislature of Illinois, and the natural interpretation of the words make it clear that the words refer only to the Constitution of the State of Illinois. An analysis of the balance of the section reinforces this conclusion. The section speaks of "appeals from and writs of error to Circuit Courts," etc. This, of course, refers to the courts of Illinois. It could mean nothing else. It also speaks of cases in which the validity of a statute or municipal ordinance is involved. The Legislature could have meant only cases in which the validity of a statute or ordinance enacted by or under the authority of the State of Illinois. It

also speaks of cases relating to revenue. Here, again, it means revenue of the State of Illinois. It also speaks of cases in which the State is interested as a party or otherwise. Here, again, it can mean only the State of Illinois. The whole section is dealing with Illinois matters and those alone. The validity of a statute of the United States need not, therefore, be taken directly to the Supreme Court, nor cases in which the revenue of the United States is involved, or in which one of the adjoining states is a party.

This Court in many opinions, has used the term "the constitution," as referring solely to the Constitution of the State of Illinois. We simply refer to the cases of *People v. Clean Street Co.*, 225 Ill. 470, at 484, where this Court said:

"It is provided by Section 22 of Article 4 supra of the Constitution [fol. 110] that the General Assembly shall not pass a law granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever * * *. If the validity of an ordinance involves a construction of the constitution, this court has jurisdiction on direct appeal under Section 88 of the Practice Act";

and to the case of *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, at page 21, where this Court said:

"In other words, counsel invoke in favor of their contention that the act is unconstitutional, Sections 2 and 13 of Article 2 of the Constitution."

In one volume alone, this Court has used the term "the Constitution" at least four times, when it refers unmistakably to the Illinois Constitution. *People v. Williams*, 298 Ill. 86, at 91; *People v. Exton*, 298 Ill. 120, at 121; *People v. Moyer*, 298 Ill. 143, at 144; *People v. Armstrong*, 298 Ill. 228, at 229. In the same volume, appear the following cases, in which reference is made to the Federal Constitution, but always by a specific designation of it as the "Federal Constitution" or some similar term. *People v. Boykin*, 11 at 13; *Consumers Co. v. Chicago*, 339 at 340 and 344; *People v. Krueger*, 536. All of these cases (and they could undoubtedly be duplicated indefinitely in other volumes) show that the natural and ordinary meaning of the term "the Constitution" when used in an Illinois statute, or in Illinois judicial proceedings, is the Constitution of Illinois, and that when the Constitution of the United States is referred to, the Court takes pains to state so explicitly.

Such a construction is in accordance with decisions of the United States Supreme Court in several cases where it is well established that the use of the word "constitution" or "constitutional" in the course of judicial proceedings in a state court refers to the Constitution of that state and not to the Constitution of the United States. We refer to *Miller v. Cornwall Railroad Co.*, 168 U. S. 131, where it is said at page 134:

"We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state constitution, and it was long ago held that where it was objected in the state courts that an act of the State was 'unconstitutional and void,' the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States. *Porter v. Foley*, 24 How. 415."

In *Kipley v. Illinois*, 170 U. S. 182, the Supreme Court of the United States said, at page 187:

"The averment in the answer, that the statute of Illinois was unconstitutional and void must be taken as intended to apply to the constitution of that State, and not to the Constitution of the United States. In *Miller v. Cornwall Railroad*, 168 U. S. 131, 134, this Court, speaking by the Chief Justice, said: 'We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state constitution; and it was long ago held that where it was objected in the state courts that an act of the State was 'unconstitutional and void,' the objection was properly construed in those courts, as raising the question whether the state legislature had the power, under the state constitution, to pass the act, and not as having reference to any repugnance to the Constitution of the United States. *Porter v. Foley*, 24 How. 415.'"

To the same effect are *Layton v. Missouri*, 187 U. S. 356, and *Bowe v. Scott*, 233 U. S. 658, at 665.

Furthermore, the Constitution of the United States provides in Article 6 that:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall [fol. 112] be made under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This Court, in its opinion just filed, has held that this cause properly belongs in the Appellate Court. If this be so, then the Constitution of the United States is binding upon that Court, for otherwise "the Judges in every State" would not be bound thereby. The Judges of the Appellate Court are as much Judges of the State, as the Judge of any trial court or the Justices of the Supreme Court of Illinois and the Federal Constitution is as binding on one as on the other. This constitutional provision is binding upon each and every Judge in the State of Illinois, no matter whether there be anything in the statutes of the State of Illinois that makes a contrary requirement. If the Illinois Statute on appeals quoted above, requires the Judges of the Appellate Court to disregard a constitutional question

rising under the Federal Constitution, then it is directly in the teeth of Article 6 of the Federal Constitution.

This appellant, therefore, prays that the opinion heretofore filed herein may be modified, so that that opinion shall specifically state that any question rising under the Constitution of the United States was not waived by the appeal to and the other proceedings in the Appellate Court for the Fourth District of Illinois.

Respectfully submitted, Cutting, Moore and Sidley, Attorneys for Appellant, Central Union Telephone Company, Cutting, Moore & Sidley. J. Dwight Dickerson, J. A. McLaughlin, of Counsel.

[fol. 113] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 114] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 22, 1924

Now comes Central Union Telephone Company, a corporation, Plaintiff in Error, and makes and files its Assignment of Errors, as follows:

1. The Circuit Court of Madison County, Illinois, erred in holding Ordinance Number 369 of the said City of Edwardsville constitutional as against the provisions of Section 10 of Article 1 of the Constitution of the United States of America.

2. The Circuit Court of Madison County, Illinois, erred in not holding Ordinance Number 369 of the said City of Edwardsville unconstitutional as being in violation of Section 10 of Article I of the Constitution of the United States of America.

3. The Appellate Court of Illinois erred in holding Ordinance Number 369 of the said City of Edwardsville constitutional as against the provisions of Section 10 of Article 1 of the constitution of the United States of America.

4. The Appellate Court of Illinois erred in not holding Ordinance Number 369 of the said City of Edwardsville unconstitutional as being in violation of Section 10 of Article I of the Constitution of the United States of America.

[fol. 115] 5. The Supreme Court of Illinois erred in holding Ordinance Number 369 of the said City of Edwardsville constitutional as against the provisions of Section 10 of Article 1 of the Constitution of the United States of America.

6. The Supreme Court of Illinois erred in not holding Ordinance Number 369 of the said City of Edwardsville unconstitutional as

being in violation of Section 10 of Article I of the Constitution of the United States of America.

7. The Appellate Court of Illinois erred in holding that the statute of the State of Illinois purporting to prohibit said Appellate Court from passing on the claim that said Ordinance Number 369 was in violation of the Constitution of the United States of America is not in violation of Paragraph 2 of Article 6 of the Constitution of the United States of America.

8. The Supreme Court of Illinois erred in holding that the statute of the State of Illinois purporting to prohibit the Appellate Court of the State of Illinois from passing on the claim that said Ordinance Number 369 was in violation of the Constitution of the United States of America is not in violation of Paragraph 2 of Article 6 of the Constitution of the United States of America.

9. The Appellate Court of Illinois erred in holding that it did not have jurisdiction to declare Ordinance Number 369 to be in violation of the Constitution of the United States of America and particularly of Section 10 of Article 1 thereof, such holding being a violation of Paragraph 2 of Article 6 of the Constitution of the United States of America.

[fol. 116] 10. The Supreme Court of Illinois erred in holding that the Appellate Court did not have jurisdiction to declare Ordinance Number 369 to be in violation of the Constitution of the United States of America, and particularly of Section 10 of Article 1 thereof, such holding being a violation of Paragraph 2 of Article 6 of the Constitution of the United States of America.

11. The Supreme Court of Illinois erred in refusing to consider whether said ordinance Number 369 was in violation of Section 10 of Article I of the Constitution of the United States of America.

12. The Supreme Court of Illinois erred in holding that the right of the Plaintiff in Error to claim that said Ordinance Number 369 was in violation of the Constitution of the United States of America was waived.

13. The Circuit Court of Madison County, Illinois, erred in entering judgment for the plaintiff.

14. The Appellate Court of Illinois erred in affirming the judgment of the Circuit Court of Madison County, Illinois.

15. The Supreme Court of Illinois erred in affirming the judgment of the Circuit Court of Madison County, Illinois, and in affirming the judgment of the Appellate Court of the State of Illinois.

16. The Circuit Court of Madison County, Illinois, erred in refusing to dismiss said suit for the reason that said ordinance Number 369 is in violation of Section 10 of Article I of the Constitution of the United States of America.

17. The Appellate Court of the State of Illinois erred in refusing to dismiss said suit for the reason last stated.

[fols. 117 & 118] 18. The Supreme Court of Illinois erred in refusing to dismiss said suit for the reason last stated.

Wherefore, for the said reasons aforesaid, and each of them, the said Central Union Telephone Company, Plaintiff in Error, prays for a reversal of the judgment of the Supreme Court of the State of Illinois in said action brought by said City of Edwardsville, Illinois, against the said Central Union Telephone Company, Plaintiff in Error, which judgment was entered in the office of the Clerk of the Supreme Court of the State of Illinois on the 20th day of October, A. D. 1923; also prays for a reversal of the order of affirmance in said action by the said Appellate Court of the State of Illinois entered on or about the 23rd day of October, A. D. 1922, and for a reversal of the judgment of the Circuit Court of Madison County, Illinois, entered in said cause on or about the 30th day of October, A. D. 1920.

Central Union Telephone Company, by Charles S. Cutting,
Nathan J. Moore, William P. Sidley, William D. Bangs,
Attorneys for Plaintiff in Error, 11 South La Salle Street,
Chicago, Illinois.

[fols. 119-123] BOND ON WRIT OF ERROR FOR \$5,000—Approved
and filed Jan. 17, 1924; omitted in printing

[fol. 124] Filed Jan. 23, '24. Chas. W. Vail, Clerk Supreme Court

UNITED STATES OF AMERICA, ss:

WRIT OF ERROR

The President of the United States of America to the Honorable
the Justices of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said plea and suit between Central Union Telephone Company, a corporation, Appellant, in said Supreme Court of the State of Illinois, and City of Edwardsville, Illinois a municipal corporation, Appellee, in said Supreme Court of Illinois, the said suit being an appeal allowed on a petition for a writ of certiorari from the Appellate Court of Illinois in and for the Fourth District where the same was heard on an appeal from the Circuit Court of Madison County, Illinois, in a certain action of assumpsit in which said City of Edwardsville was plaintiff and said

Central Union Telephone Company was defendant, wherein was drawn in question the validity of an ordinance of the said City of Edwardsville and a statute of or an authority exercised under the State of Illinois on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity, a manifest error bath happened to the great damage of the said Central Union Telephone Company as by its complaint [fol. 125] appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 17th day of January, in the year of our Lord one thousand nine hundred and twenty-four.

John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois. (Seal.)

Allowed by William M. Farmer, Chief Justice of the Supreme Court of Illinois. William M. Farmer.

[fols. 126 & 127] SUPREME COURT OF ILLINOIS

CERTIFICATE OF LODGMENT

I, Charles W. Vail, Clerk of the Supreme Court Do Hereby Certify that there was lodged with me as such Clerk on the 23rd day of January, A. D. 1924, in the matter of Central Union Telephone Company, a corporation, vs. City of Edwardsville, Illinois, a Municipal Corporation—

1. The original bond of which a copy is herein set forth.
2. A copy of the writ of error to file in my office and a copy of said writ of error for the defendant in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, Illinois, this 9th day of February, A. D. 1924.

Chas. W. Vail, Clerk Supreme Court. (Seal of the Supreme Court, State of Illinois.)

[fols. 128&129] CITATION—In usual form, showing service on **Frank L. Nash**; filed Feb. 7, 1924; omitted in printing

[fol. 130]

SUPREME COURT OF ILLINOIS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within cause with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the said Supreme Court of Illinois in the City of Springfield, this 9th day of February, A. D. 1924.

Chas. W. Vail, Clerk Supreme Court of Illinois. (Seal of the Supreme Court, State of Illinois.)

Endorsed on cover: File No. 30,133. Illinois Supreme Court. Term No. 293. Central Union Telephone Company, plaintiff in error, vs. City of Edwardsville, Illinois. Filed February 18th, 1924. File No. 30,133.

U. S. Supreme Court, U. S.

FILED

SEP 17 1925

WM. R. STANSBURY
CLERK

No. 37

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

CENTRAL UNION TELEPHONE COMPANY,

Plaintiff in Error.

vs.

CITY OF EDWARDSVILLE,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM DEAN BANGS,
JAMES DWIGHT DICKERSON,

Attorneys for Central Union Telephone Company,
Plaintiff in Error.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

30,133



INDEX.

	PAGE
Assigned specifications of error	9
Argument	13
Concise statement of case	5
Grounds for jurisdiction	1
Jurisdictional grounds	1
Specifications of error	9
Statement of case	5
Summary of argument	10

TABLE OF CASES.

Aetna Life Insurance Co. v. Dunken, 266 U. S. 389....	10
American Railway Express Co. v. Levee, 263 U. S. 19	4, 10, 16
Atlantic Coast Line v. Burnette, 239 U. S. 199.....	11, 20
Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 555	10, 18
Boise Water Co. v. Boise City, 230 U. S. 84, 90.....	4, 12, 24, 25
Cheek v. Prudential Insurance Co., 192 S. W. 387; 209 S. W. 928;; 223 S. W. 754	13, 14
Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42	12
Chicago v. P. C. C. & St. L. R. R. Co., 244 Ill. 220.....	12
City of Edwardsville v. Central Union Telephone Co., 302 Ill. 362	1, 3, 7, 8, 12, 24
227 Ill. App. 424, 426	2, 8
309 Ill. 482	3, 8
City of Peoria v. Postal Telegraph Cable Co., 274 Ill. 568	12, 23
City of Quincy v. C. R. & O. R. R. 92 Ill. 21	12

City of Sullivan v. Best, 286 Ill. 315	11
City of Vandalia v. Postal Telegraph Cable Co., 274 Ill. 173	12, 21
Davis v. O'Hara, 266 U. S. 314	4, 10, 15
Davis v. Wechsler, 263 U. S. 22	4, 10, 11, 15, 16, 20
239 S. W. 554, 556	16
Grannis v. Ordean, 234 U. S. 385	4, 10
Harrison v. St. L. & S. F. R. R. Co., 232 U. S. 318, 328	10, 18
Leigh v. Green, 193 U. S. 79	4, 10
Love v. Griffith, 266 U. S. 32	10, 18, 19
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650	4
People v. C. U. T. Co., 192 Ill. 307	11
People v. Union Gas Co., 260 Ill. 392	12
Perrin v. Parker, 126 Ill. 201	11, 19
Prudential Insurance Co. v. Cheek, 259 U. S. 530	4, 10, 13, 14
Reinman v. Little Rock, 237 U. S. 171, 176	11, 18
Spies v. Illinois, 123 U. S. 131, 181	10, 18
Springfield v. Interstate Ind. Tel. & Teleg. Co., 279 Ill. 324	11, 12, 23
Springfield v. Postal Telegraph Cable Co., 253 Ill. 346	12, 23
Star Brewery Co. v. Primas, 163 Ill. 652, 662.....	11, 19
Truax v. Corrigan, 257 U. S. 312, 324	4, 10, 17
Union Pacific Railway Co. v. Public Service Commis- sion of Missouri, 248 U. S. 67.....	4, 10, 17
Village of London Mills v. White, 208 Ill. 289.....	11
Walla Walla v. Walla Walla Water Company, 172 U. S. 1, 9	11, 21
Ward v. Love County, 253 U. S. 17, 22	10

UNITED STATES CONSTITUTION; STATUTES; ORDINANCES.

Article I, Section 10	2
Article VI	3
Fifth Amendment	2
U. S. Judicial Code, Section 237	4, 18
City of Edwardsville, Illinois, Ordinances Nos. 72, (Rec. 12); 369, (Rec. 23)	5

OFFICIAL REPORTS IN LOWER COURTS.

City of Edwardsville v. Central Union Telephone
Company—

302 Ill. 362	1, 3, 7, 12, 24
227 Ill. App. 424, 426	2, 8
309 Ill. 482	3, 8



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

CENTRAL UNION TELEPHONE COMPANY, <i>Plaintiff in Error.</i> vs. CITY OF EDWARDSVILLE, <i>Defendant in Error.</i>	}	
---	---	--

BRIEF FOR PLAINTIFF IN ERROR.

Jurisdictional Grounds.

The case is here upon writ of error allowed by the Chief Justice of the Supreme Court of Illinois, to review proceedings in the Illinois State courts resulting in a judgment entered by the Illinois Supreme Court October 20, 1923. (Rec. 35.)

In order to understand the jurisdictional grounds, a brief statement of the proceedings in the state courts is necessary. A federal constitutional question as to the validity of a municipal ordinance was raised by the pleadings in the state Circuit Court and decided against the plaintiff in error. An appeal was taken to the state Appellate Court which transferred the case to the state Supreme Court. The state Supreme Court held that the appeal to the Appellate Court had waived both the state and Federal Constitutional questions raised by the assignment of errors (*City of Edwardsville v. Central*

Union Telephone Co., 302 Ill. 362), and retransferred the case to the Appellate Court. The plaintiff in error immediately filed a petition for rehearing in the Supreme Court, contending that even if the state constitutional question had been waived by the appeal to the Appellate Court, the Federal Constitutional question could not be waived under Article 6 of the Constitution. This petition for rehearing was denied, and the case held in the Appellate Court, which decided against plaintiff in error, without considering any constitutional question. (*City of Edwardsville v. Central Union Telephone Company*, 227 Ill. App. 424, 426.) The Supreme Court of Illinois then reviewed the case upon certiorari, again deciding against the plaintiff in error, and again holding that the Federal Constitutional question had been waived. We have, therefore, two questions under the Federal Constitution: *first*, whether the Federal Constitutional question was waived under the state procedure; and *second*, whether the ordinance in question in the case violated the Federal Constitution, the latter point being the Federal question which was held waived.

The specific claims relied upon as the basis of this Court's jurisdiction, and the rulings made thereon, are as follows:

In the pleadings in the Circuit Court of Madison County the ordinance of the City of Edwardsville in question in this proceeding was stated to be void as contravening Section 10 of Article 1, and the Fifth Amendment to the Constitution of the United States. (Rec. 16, 17.) Propositions of law were offered in support of these pleadings and refused by the Circuit Court. (Rec. 28.) Errors were assigned on these constitutional questions in the Appellate and Supreme Courts. (Rec. 5, 6.) The Circuit Court decided in favor of the con-

stitutionality of the ordinance, and the question was raised in both the Appellate and Supreme Courts.

The second claim relied upon as a basis of this Court's jurisdiction arises from the holding of the Supreme Court of Illinois that the Federal Constitutional issue was waived by the plaintiff in error first taking an appeal from the Circuit Court to the Appellate Court of Illinois, this holding resulting in the judgment of the Supreme Court transferring the case to the Appellate Court (Rec. 2) (*City of Edwardsville v. Central Union Telephone Company*, 302 Ill. 362), and the final judgment of the Supreme Court upon certiorari from the Appellate Court. (Rec. 35.) *City of Edwardsville v. Central Union Telephone Company*, 309 Ill. 482. In a petition for rehearing filed by the plaintiff in error in the Supreme Court of Illinois (Rec. 47), after the first opinion of the Supreme Court, which petition for rehearing was denied (302 Ill. 362), plaintiff in error raised the question that the decision of the Supreme Court, holding that the Federal Constitutional question had been waived was contrary to Article 6 of the Constitution of the United States. The Supreme Court of Illinois in its second opinion filed (309 Ill. 482), reaffirmed its position in its former opinion that (p. 483) "all constitutional issues have been waived by taking an appeal to the Appellate Court, and such issues are not proper for consideration here," and that after having recognized in its former opinion (302 Ill. 362) that the principal defense of the plaintiff in error was that the ordinance was invalid because it contravened certain provisions of the Federal Constitution and of the state constitution.

We have, therefore, two constitutional questions as a basis of this court's jurisdiction: *first*, that the ordinance contravened the Federal Constitution; and, *sec-*

ond, that the holding of the Supreme Court that the constitutionality of the ordinance was waived contravenes the sixth article of the Federal Constitution. This latter question was raised by the plaintiff in error by its petition for rehearing as soon as the question of the waiver was decided, and is clear ground for this Court's jurisdiction under the provisions of Section 237 of the Judicial Code in effect prior to May 13, 1925.

The cases relied upon to sustain the jurisdiction of this court under the first constitutional question are

New Orleans Gas Company v. Louisiana Light Co., 115 U. S. 650.

Boise Water Co. v. Boise City, 230 U. S. 84, 90.

and under the second constitutional question the cases relied upon are:

Prudential Insurance Co. v. Cheek, 259 U. S. 530, a case in which a motion to dismiss a writ of error was denied; almost identical with the case at bar.

Davis v. O'Hara, 266 U. S. 314.

Davis v. Wechsler, 263 U. S. 22.

Truax v. Corrigan, 257 U. S. 312, 324.

Union Pacific Railway Co. v. Public Service Commission of Missouri, 248 U. S. 67.

American Railway Express Co. v. Levee, 263 U. S. 19.

And as to raising a federal question by petition for rehearing.

Leigh v. Green, 193 U. S. 79.

Grannis v. Ordean, 234 U. S. 385.

Which decisions are discussed in the argument.

Concise statement of case.

This case involves the constitutionality under the Federal Constitution of an ordinance of the City of Edwardsville, Illinois, known as Ordinance Number 369, passed July 7, 1914. The title and Paragraph 1 of the ordinance, the only portions of importance, read as follows (Rec. 23):

"An ordinance fixing the compensation to be paid the city by persons, firms and corporations owning, controlling or occupying posts or poles in the streets, alleys or sidewalks.

Be it ordained by the City Council of the City of Edwardsville:

Section 1. That any person, firm or corporation owning, controlling or occupying any post or pole over eight feet high which may occupy any portion of any street, alley or sidewalk within the City of Edwardsville, Illinois, such post or pole being used to support electric or other wires of whatsoever nature, or to support any sign or any display for the purpose of advertising, shall pay annually into the treasury of the said city the sum of fifty cents for each pole or post owned, controlled or occupied by said person, firm or corporation as compensation to the said city for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy."

In July, 1882, the City of Edwardsville had passed Ordinance Number 72, which granted to the Central Telephone Company, its successors and assigns, a right-of-way in the streets, sidewalks, alleys and public grounds of the city, for the purpose of erecting, maintaining and using the necessary poles and wires to successfully operate a telephone system. The ordinance was granted upon the condition that the grantee should maintain and use an office and operator on lines of telephone wires at some convenient point in the city and that it should set its poles so as not to interfere with

Paley
Edwards

travel and put and keep in good condition all parts of the streets, etc., interfered with. The grantee was required to refrain from interfering with the flow of water in any gutter or drain, and the location of the poles was to be determined under the direction of the street commissioner or city civil engineer. The City Council reserved the right to grant a right-of-way to other telephone companies. (Rec. 20.)

Thereafter, in September, 1897, the Central Telephone Company transferred the rights granted to it under Ordinance No. 72 to the plaintiff in error, the Central Union Telephone Company. All the obligations imposed upon the grantee by Ordinance No. 72 have been continuously performed by plaintiff in error or its predecessor in title. (Rec. 21.)

On September 7, 1897, the City Council adopted a resolution in which the plaintiff in error, as the successor and assignee of the Central Telephone Company, was requested to furnish to the city without charge, so long as the company should exercise unimpaired its rights under Ordinance No. 72, one telephone, to be placed where the city should designate, and such additional telephones as the City Council might call for, at a reduction of twenty-five per cent from the regular rates charged for business telephones, and the right to attach, without charge, fire and police alarm wires to the top cross-arm of each pole. The company was requested to file its acceptance in the office of the city clerk. (Rec. 22.)

On October 4, 1897, the plaintiff in error filed in the office of the city clerk of Edwardsville its acceptance of the resolution last referred to. Since that time, the plaintiff in error has complied with the provisions of this resolution and has furnished the city with the service and facilities mentioned in the terms there stated. (Rec. 22, 23.)

The plaintiff in error had substantially 1,000 poles in the streets of Edwardsville. (Rec. 24.) The city brought suit on Ordinance No. 369 to recover the sum of fifty cents for each of these poles. (Rec. 7.) The plaintiff in error defended the suit on the ground, among other things, that the ordinance upon which it was based, was unconstitutional by reason of its violation of Section 10 of Article I of the Federal Constitution, prohibiting a state from passing any law impairing the obligation of a contract. The decision of the Circuit Court held the ordinance valid (Rec. 20), overruling the following defenses. (Rec. 16, 17, 18.)

1. That Ordinance No. 369 did not apply to the plaintiff in error;
2. That Ordinance No. 369 was unconstitutional under the State Constitution; and
3. That Ordinance No. 369 was unconstitutional under the Federal Constitution, prohibiting the impairment of the obligations of a contract.

After the trial Court had overruled all of these defenses, an appeal was prayed and perfected by the plaintiff in error to the Appellate Court of Illinois. That Court (Rec. 1) being of the opinion that a constitutional question was involved, transferred the case to the Supreme Court.

After the case was docketed, the Supreme Court filed an opinion transferring the case back to the Appellate Court (Rec. 2), saying (302 Ill. 362, 364):

“The validity of the ordinance is challenged on the ground that it is unconstitutional, but this question was waived by taking the appeal to the appellate court and by assigning errors in that court which it had jurisdiction to hear and determine. The errors assigned in the Appellate Court included, among others, the contentions that the ordinance did not apply to the appellant; that the evidence did not justify the finding that appellant was indebted to

appellee in the sum of Three Thousand Dollars, and that the judgment was excessive. All these questions were questions of which the Appellate Court had jurisdiction and the case was therefore improperly transferred to this court."

The plaintiff in error then filed a petition for rehearing (Rec. 47) in the Supreme Court, pointing out that this holding was erroneous so far as it affected the Federal Constitutional question. The petition was denied. (302 Ill. 362.)

The case was thereupon redocketed in the Appellate Court, which reduced the judgment to the proper amount and thereupon affirmed the judgment of the lower court. (227 Ill. App. 424.) (Rec. 4.) The plaintiff in error then took the case by certiorari to the Supreme Court of Illinois, claiming that Ordinance 369 did not apply to the plaintiff in error and that, if it did, it was unconstitutional under the Federal Constitution, and that the Federal question could not be waived under Article VI of the Federal Constitution. The Supreme Court dealt with the two constitutional questions in the following language, 309 Ill. 482, 483 (Rec. 32):

"This case has previously been before this court in *City of Edwardsville v. Central Union Tel. Co.*, 302 Ill. 362. The case had been transferred to this court by the Appellate Court for the fourth district, on the ground that the Appellate Court had no jurisdiction of the case. Issues then presented to the Appellate Court involved, among others, constitutional questions but this court held, in conformity with the established Illinois cases, that the question of constitutionality was waived by taking the appeal to the Appellate Court and by assigning errors in that court which had jurisdiction to hear and determine. We then held that the case was improperly transferred to this court and transferred the case back to the Appellate Court for the Fourth District."

The balance of the opinion deals with the question of the applicability of Ordinance 369 to the plaintiff in error, with which we are not now concerned.

ASSIGNED SPECIFICATIONS OF ERROR.

(Rec. 52, 53.)

I.

The Supreme Court of Illinois erred in holding that the right of the plaintiff in error to claim that said Ordinance No. 369 was in violation of the Constitution of the United States of America was waived.

II.

The Supreme Court of Illinois erred in refusing to consider whether said Ordinance No. 369 was in violation of Section 10 of Article I of the Constitution of the United States of America.

III.

The Supreme Court of Illinois erred in holding Ordinance No. 369 of the said City of Edwardsville constitutional as against the provisions of Section 10 of Article I of the Constitution of the United States of America.

IV.

The Circuit Court of Madison County, Illinois, erred in holding Ordinance No. 369 of the said City of Edwardsville constitutional as against the provisions of Section 10 of Article I of the Constitution of the United States of America.

SUMMARY OF ARGUMENT.

I.

The law is well settled that this Court is not bound by the determination of a state court that a federal constitutional question has been waived.

Davis v. Wechsler, 263 U. S. 22.

American Ry. Express v. Levee, 263 U. S. 19.

Prudential Ins. Co. v. Cheek, 259 U. S. 530.

Union Pacific Ry. v. Public Service Commission of Mo., 248 U. S. 67.

Truax v. Corrigan, 257 U. S. 312, 324.

Davis v. O'Hara, 266 U. S. 314.

Aetna Life Insurance Company v. Dunken, 266 U. S. 389.

II.

Where there is a plain assertion of a federal constitutional right in a lower court, local rules as to how far it will be reviewed on appeal do not prevail.

Love v. Griffith, 266 U. S. 32.

Davis v. Wechsler, 263 U. S. 22.

Ward v. Love County, 253 U. S. 17, 22.

(a) *The jurisdiction of this Court is determined by Sec. 237 Judicial Code as amended.*

Harrison v. St. L. & S. F. R. R. Co., 232 U. S. 318, 328.

(b) *The federal constitutional right was "drawn in question" within the meaning of this section.*

Spies v. Illinois, 123 U. S. 131, 181.

Leigh v. Green, 193 U. S. 79.

Grannis v. Ordean, 234 U. S. 385.

(c) *An ordinance is a "statute" within the meaning of this section.*

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 555.

Reinman v. Little Rock, 237 U. S. 171, 176.

III.

Under no rule of law can it be maintained that plaintiff in error had waived its rights under the Federal Constitution.

(a) *Waiver implies intentional relinquishment of a right.*

Perrin v. Parker, 126 Ill. 201.

Star Brewery Co. v. Primas, 163 Ill. 652, 662.

(b) *The constant assertion of the Federal right can not have the effect of a waiver.*

Atlantic Coast Line v. Burnette, 239 U. S. 199.

Davis v. Wechsler, 263 U. S. 22.

IV.

Where the privilege of the use of a street is granted by an ordinance, which is accepted and acted upon by the grantee, the ordinance becomes a binding contract between the city and the company from which the city cannot recede, and as such is protected against subsequent impairment by legislative action.

Walla Walla v. Walla Walla Water Company, 172 U. S. 1, 9.

Village of London Mills v. White, 208 Ill. 289.

People v. C. U. T. Co., 192 Ill. 307.

City of Sullivan v. Best, 286 Ill. 315.

Springfield v. Interstate Ind. Tel. & Teleg. Co., 279 Ill. 324.

- City of Vandalia v. Postal Telegraph Cable Co.*,
274 Ill. 173.
Chicago Municipal Gas Light & Fuel Co. v.
Town of Lake, 130 Ill. 42.
People v. Union Gas Co., 260 Ill. 392.
City of Quincy v. C. B. & Q. R. R., 92 Ill. 21.
Chicago v. P. C. C. & St. L. R. R. Co., 244 Ill.
220.

V.

Ordinance No. 369 is not a police ordinance but is one solely to raise revenue by a charge in the nature of a rental for the use of space in streets.

- Springfield v. Postal Telegraph Cable Co.*, 253
Ill. 346.
Springfield v. Interstate Tel. & Teleg. Co., 279
Ill. 324, 327.
City of Edwardsville v. Central Union Tele-
phone Co., 302 Ill. 362.
City of Peoria v. Postal Telegraph Cable Co.,
274 Ill. 568.

VI.

As against a company having a valid right to occupy the streets under a grant from a municipality a subsequent rental ordinance is unconstitutional.

- Boise Water Co. v. Boise City*, 230 U. S. 84,
90.

ARGUMENT.

I.

The law is well settled that this Court is not bound by the determination of a state court that a federal constitutional question has been waived.

The merits of the constitutional question were never passed upon by the Supreme Court of Illinois. That Court determined that the plaintiff in error had waived the federal constitutional question by reason of the perfection of the appeal to the Appellate Court rather than to the Supreme Court.

So far as we can ascertain from a rather extended search, the Illinois Supreme Court has never before held that the perfection of an appeal to the Appellate Court was a waiver of *federal* constitutional questions.

The fact that the Illinois Supreme Court has disposed of the Federal Constitutional question upon the basis that the plaintiff in error had waived the question does not preclude this Court from determining for itself whether the waiver has, in fact, taken place. Similar questions have in the last few years been frequently passed upon by this Court. A recent decision is directly in point and decisive of the case at bar.

In *Prudential Insurance Co. v. Cheek*, 259 U. S. 530, an action was instituted in the Circuit Court of the City of St. Louis. Judgment was entered for the defendant on the pleadings. On an appeal by the plaintiff to the Supreme Court, the judgment of the Circuit Court was reversed and the cause remanded. *Cheek v. Prudential In-*

urance Co., 192 S. W. 387. Thereafter the defendant filed an answer, raising federal questions, and the cause went to trial, resulting in a verdict for plaintiff. The defendant thereupon appealed to the Supreme Court, which held that the record contained nothing to give it jurisdiction, and transferred the cause to the Appellate Court. *Cheek v. Prudential Insurance Co.*, 209 S. W. 928. The latter Court held (223 S. W. 754) that the federal constitutional question *was eliminated from the case by the appeal to the Supreme Court, which alone had jurisdiction to determine such a question*, and as no other question than the constitutional question was involved, affirmed the judgment. The case came before this Court on writ of error. A motion was made to dismiss the writ, which was denied, the Court saying, 259 U. S. 533:

"On the issues so made up, the case went to trial and resulted in a verdict in favor of plaintiff upon both counts. Defendant having reserved its constitutional points, appealed from the resulting judgment to the Supreme Court, which, however, refused to take jurisdiction on the ground that all constitutional questions had been decided on the former appeal and that the verdict, being for only \$1,500, was less than the jurisdictional amount required by statute; and hence transferred the cause to the St. Louis Court of Appeals for final disposition. 209 S. W. 928. * * * Thereafter it was submitted to the St. Louis Court of Appeals, which in conformity to the former opinion of the Supreme Court affirmed the judgment (223 S. W. 754), overruled a motion for rehearing and refused an application for certification of the case to the Supreme Court. A writ of error from this court to the St. Louis Court of Appeals followed under Sec. 237, Judicial Code, as amended by Act of September 6, 1916, c.448.39 Stat. 726.

A motion to dismiss the latter writ, based upon the ground that the judgment of the Court of Appeals is not that of the highest court of the State in

which a decision in the suit could be had, because the first decision of the Supreme Court rendered the constitutional questions *res judicata*, and that under the state constitution the Court of Appeals has no jurisdiction to pass upon questions of that character, manifestly must be denied, and the case considered on its merits."

The only difference in procedure is that in the present proceeding the case went again to the State Supreme Court on certiorari with the result that the writ of error is to the Supreme Court instead of the Appellate Court of the State. In the case cited as controlling, the court from which the writ of error issued held that an appeal to another state tribunal had waived a federal question but the jurisdiction of this Court was maintained upon a motion to dismiss and all constitutional questions determined.

In *Davis v. O'Hara*, 266 U. S. 314, this Court in discussing the holding of a state court that the director general of railroads had *waived* his right to be sued in any other place than provided in General Order No. 50a, said, page 318:

"This court is not bound by the decision of the state court that the defendant waived his federal right under the Act and the orders of the Director General, and it may determine for itself whether he sufficiently asserted and insisted upon that right. *Davis v. Wechsler*, 263 U. S. 22, 24; *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79, 86; *Georgia Ry. Co. v. Decatur*, 262 U. S. 432, 438; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261."

In *Davis v. Wechsler*, 263 U. S. 22, a suit had been started against Walker D. Hines as Director General of Railroads. Hines filed a plea of general denial, and alleged that the Court was without jurisdiction, because the suit was brought in another jurisdiction than that provided for by General Order 18-A, issued by the Di-

rector General. When Davis was made Director General of Railroads, he was substituted as defendant and "the substituted defendant entered his appearance in said cause, and adopted the answer theretofore filed by the said Walker D. Hines." The case was taken to the Supreme Court of Missouri, 239 S. W. 554, 556, where the question was presented whether this general appearance was "a waiver" of the right to contest the venue. The state Court said, page 556:

"In ruling the present point against the defendant, we prefer to place our decision on the ground that the venue was *waived* by the defendant entering his general appearance."

When the case appeared in this court, the plaintiff argued that the case must be affirmed because the decision of the state Court was based upon local and not federal grounds. This Court denied the claim, saying, 263 U. S. 24:

✓
 "Whatever springs the state may set for those who are endeavoring to assert rights that the state confers, *the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.* * * * If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right, or to bar the assertion of it even upon local grounds. This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

The same doctrine is laid down in *American Railway Express Co. v. Levee*, 263 U. S. 19, where this Court again said, page 21:

"The law of the United States cannot be evaded by the forms of local practice."

We quote from *Truax v. Corrigan*, 257 U. S. 312, 324:

"In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been *waived or lost*, this court, as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669. *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611."

Union Pac. Ry. Co. v. Public Service Commission of Missouri, 248 U. S. 67. The railroad company sued to recover fees charged for the authorization of an issue of bonds, and paid under protest, on the ground that the same was an interference with interstate commerce. On an appeal the Supreme Court of Missouri held that it had "waived" its right to recover. This Court said, after determining that the claim was in fact an unlawful interference with interstate commerce, page 69:

"The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the railroad company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court, but the later decisions show that such is not the law and that, on the contrary, it is the duty of this court to examine for itself whether there is any basis in the admitted facts or in the evidence when the facts are in dispute for a finding that the federal right has been *waived*. *Cresswill v. Knights of Pythias*, 225 U. S. 246.

II.

Where there is a plain assertion of a federal right in a state court, local rules as to how far it will be reviewed on appeal do not prevail.

The jurisdiction of this Court is, of course, determined by the Federal Constitution and statutes. State statutes cannot enlarge or diminish the right conferred upon this Court to determine constitutional questions. *Harrison v. St. L. & S. F. R. R.*, 232 U. S. 318, 328. The yardstick of this Court's jurisdiction must therefore be found in the federal statutes. They provide (Sec. 237 Judicial Code as amended) that:

"A final decree in any suit in the highest court of a state, in which a decision of the suit could be had * * * where is drawn in question the validity of a statute of * * * any state, on the ground of its being repugnant to the constitution * * * of the United States and the decision is in favor of their validity, may be examined and reversed or affirmed in the Supreme Court upon writ of error."

A Municipal Ordinance is a statute within the meaning of the Judicial Code quoted above. *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 555; *Reinman v. Little Rock*, 237 U. S. 171, 176.

The question therefore in the case at bar is whether the validity of Ordinance No. 369 "was drawn in question" by the pleadings, propositions of law and assignments of error which had been filed by the plaintiff in error in the various courts at the various stages of the litigation. *Spies v. Illinois*, 123 U. S. 131, 181. The fact that the so-called local procedure on appeal has, perhaps, not been followed by the plaintiff in error is unimportant. See, in this connection, *Love v. Griffith*, 266 U. S. 32, where this Court said, page 33:

"When, as here, there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail. *Davis v. Wechsler*, 263 U. S. 22, 24. Whether the right was denied or not given due recognition by the Court of Civil Appeals is a question as to which the plaintiffs are entitled to invoke our judgment. *Ward v. Love County*, 253 U. S. 17, 22."

In the case at bar, the federal question was not considered by the Supreme Court of Illinois, although the question was twice before that Court on the pleadings.

III.

Under no rule of law can it be maintained that the plaintiff in error had waived its rights under the Federal Constitution.

When it is remembered that "a waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it," *Perrin v. Parker*, 126 Ill. 201, 206, *Star Brewery Co. v. Primas*, 163 Ill. 652, 662, there can be no justification for any holding that the Federal right was waived. Throughout the litigation by plea, propositions of law, assignments of error, by argument and by the constant assertion of its rights, whenever the plaintiff in error was called upon to state its position on the record, it has uniformly contended that Ordinance No. 369 was in violation of its rights under the Federal Constitution. To say that under such circumstances, an appeal to the Appellate Court, was a waiver of the constitutional question, is to make an unfounded assertion. The constant reiteration of the violation of its federal constitutional rights by the plaintiff in error can by no known logic be twisted into an intention to relinquish that right. "A right may be waived or lost by a fail-

ure to assert it at the proper time, *Burnette v. Desmornes*, 226 U. S. 145, but when a party has meant to insist on all the rights it might have, such a result would be unusual and extreme." *Atlantic Coast Line v. Burnette*, 239 U. S. 199. And we may add that when such a party has *actually insisted* on such rights, such a result is insupportable and unthinkable.

Since the decision of the Supreme Court in the case at bar was of first instance in deciding that Federal constitutional questions are thus waived, it necessarily follows that the waiver was enforced upon the telephone company by an act perfected before knowledge of the fact that there could be any waiver.

The company must submit to the waiver of the state constitutional right which had become the established law under the decisions of the state Supreme Court, laying a fatal trap for the litigant and his lawyer, but this Court should not deepen the pit to include a waiver of Federal questions.

We venture to say that no case can be found in the books where this Court has refused to examine the merits of a federal constitutional question, when the party invoking that jurisdiction has in good faith consistently, constantly and specifically insisted on his federal rights, even though the state court has decided against that right upon some supposed ground of local procedure. To quote again from *Davis v. Wechsler*, 263 U. S. 22, page 24:

"Whatever springs the state may set for those who are endeavoring to assert rights that the state confers, *the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.*"

The question of the constitutionality of a waiver of a Federal question was properly presented in the state courts and decided against the plaintiff in error. There-

fore this court has jurisdiction upon writ of error. It should now decide first that there was no valid waiver and second that the ordinance is void under the provision of the Federal Constitution which was not waived.

IV.

Where the privilege of the use of a street is granted by an ordinance, which is accepted and acted upon by the grantee, the ordinance becomes a binding contract between the city and the company from which the city cannot recede, and as such is protected against subsequent impairment by state legislative action.

This doctrine is so firmly established that it would seem that the citation of authorities was unnecessary. We quote, however, from *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, where this Court said, page 9:

“* * * but is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets upon condition of the performance of its service by the grantee is a grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee is a contract protected by the constitution of the United States against state legislation to impair it. *New Orleans Gas Co. v. Louisiana Lt. Co.*, 115 U. S. 650, 660; *New Orleans Water Wks. Co. v. Rivers*, 115 U. S. 674; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138, 147.”

That Illinois has consistently held the same doctrine is abundantly testified to by the cases cited in the brief. Of these cases we quote only from *City of Vandalia v.*

Postal Telegraph Cable Co., 274 Ill. 173, where the Court says at page 176:

"This court has repeatedly held that when a city has granted the right to use its streets to a corporation and the corporation accepts the privileges and enters upon the right to use the streets and has laid out large sums of money in preparation for carrying on its corporate business, said grant becomes a binding contract between the city and the company which cannot be rescinded or revoked except for cause. *Chicago Municipal Gas Lt. Co. v. Town of Lake*, 130 Ill. 42; *City of Belleville v. Citizens Horse Rwy. Co.*, 152 *id.* 171; *Village of London Mills v. White*, 208 *id.* 289; *People v. Central Union Tel. Co.*, 232 *id.* 260."

All the facts are covered by a stipulation in which it was agreed, among other things, that upon the enactment of Ordinance Number 72 the grantee entered upon the enjoyment of the rights granted thereunder and the performance of the obligations imposed upon it by the ordinance (Rec. 21); that after the transfer of the rights of the Central Telephone Company to the Central Union Telephone Company, the latter performed all of the obligations required by the ordinance to be performed by the grantee (Rec. 22); that after ~~the~~ the passage and acceptance of the resolution of 1897 the plaintiff in error had at all times furnished to the city without charge a telephone placed in the city building for use by the city, and had, in addition, furnished to the city, at a discount of twenty-five per cent from its regular charge for business telephones, all telephones that the city had requested, and had, without charge, permitted the city to attach its police and fire-alarm signal wires to the poles of the plaintiff in error, all of which rights the city was enjoying up to the time of the trial; that the plaintiff in error had over a thousand poles in the streets of the City of Edwardsville and that its plant was worth at least \$37,000. (Rec. 24.)

Ordinance No. 72, upon its acceptance and the performance by the grantee of the obligations therein imposed on it and the expenditure of money in reliance thereon in the construction of its plant in the City of Edwardsville, created a contract between the grantee and the municipality which is protected by the prohibition in the Federal Constitution against laws impairing the obligation of a contract. The rights of the original grantee, under Ordinance No. 72, namely, the Central Telephone Company, are now duly vested in the plaintiff in error, Central Union Telephone Company. (Rec. 22.)

V.

Ordinance No. 369 is not a police ordinance but is one solely to raise revenue by a charge in the nature of a rental for the use of space in streets.

Ordinance No. 369 specifically provides that the sum of fifty cents per pole is assessed "as compensation to said city for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy." Such an ordinance has found considerable favor among the municipalities in Illinois and the Supreme Court of that state has always construed it as a compensation ordinance in which the municipality is charging the wire-owning company rent for the use of space in the streets. This has been so held in each of the following cases where the Supreme Court was dealing with an ordinance identical in terms with that involved in the case at bar.

Springfield v. Postal Tel. Cable Co., 253 Ill. 346.

Springfield v. Interstate Tel. & Teleg. Co., 279 Ill. 324, 327.

City of Peoria v. Postal Tel. Cable Co., 274 Ill. 568.

If other authority were wanted, it is to be found in the decision of the Supreme Court of Illinois, in the case at bar—*City of Edwardsville v. Central Union Tel. Co.*, 302 Ill. 362, where that Court said, page 364:

“Cases involving a judgment in debt based on ordinances of the character of the compensation ordinance involved in the case at bar have been before this court in the *City of Springfield v. Postal Tel. Cable Co.*, 253 Ill. 346; *City of Peoria v. Postal Tel. Cable Co.*, 274 *ib.* 568; and *City of Springfield v. Interstate Tel. & Tel. Co.*, 279 *ib.* 324, where we held that the fixing of a charge in the nature of rental for the occupation by public service corporations of parts of the streets of a city is not the exercise of any governmental power but is the exercise of the proprietary power of the city.”

VI.

As against a company having a valid right to occupy the streets under a grant from a municipality a subsequent rental ordinance is unconstitutional.

It would seem to be self-evident that if the plaintiff in error has a valid right under a contract with the City of Edwardsville to occupy its streets upon the terms specified in the Ordinance No. 72 and the resolution of 1897, an ordinance assessing that company an additional charge of fifty cents per pole as rental for the space occupied by the poles of the company is a direct impairment of the obligation of the contract between the two parties. The exact point has been definitely determined by this Court, in the case of *Boise Water Co. v. Boise City*, 230 U. S. 84. In that case the predecessor of the water company had been granted an easement in the streets for the purpose of laying its pipes therein. A later ordinance was passed, requiring the water company to pay “a monthly license of \$300 for the privilege granted by said ordinance of October 31, 1889, to lay and repair water pipes in the streets

and alleys of said city." In a counterclaim presented by the city against the company, based on this rental ordinance, this Court said, at page 92:

"For the purposes of this case we need go no further than to hold, as we do, that the street easement was not a mere revocable license and that if limited in time by Section 2710 Rev. Stat. of Idaho, that time had not expired when the ordinance of 1896 was passed. The plain effect of this later ordinance was to impair the obligation of the contract resulting from the ordinance conferring the street easement. The court below erred therefore in instructing the jury to allow the counter-claim."

Ordinance Number 369 was a direct violation of the prohibition contained in the Constitution of the United States against a state passing any law impairing the obligation of a contract. The company was simply required by the ordinance to pay \$500 more a year for the rights already granted to it, and to contribute such sum every year until the assessment was repealed or the company ceased to use the streets for its poles.

The plaintiff in error strayed in the maze of state procedure and lost the protection of the state constitution; the Federal Constitution protects contracts with municipalities against impairment by subsequent action of the municipality, and the constitutional rights thus guaranteed are not to be nullified indirectly by a decision of the state court holding that the constitutional guarantee was waived by the plaintiff in error, which at all times asserted its Federal rights.

Respectfully submitted,

WILLIAM DEAN BANGS,

JAMES DWIGHT DICKERSON,

Attorneys for Central Union Telephone Company, Plaintiff in Error.

September 15, 1925.



SEP 30 1925

WM. R. STANBURY
CLERK

No. 37.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1925.

CENTRAL UNION TELEPHONE
COMPANY,

Plaintiff in Error,

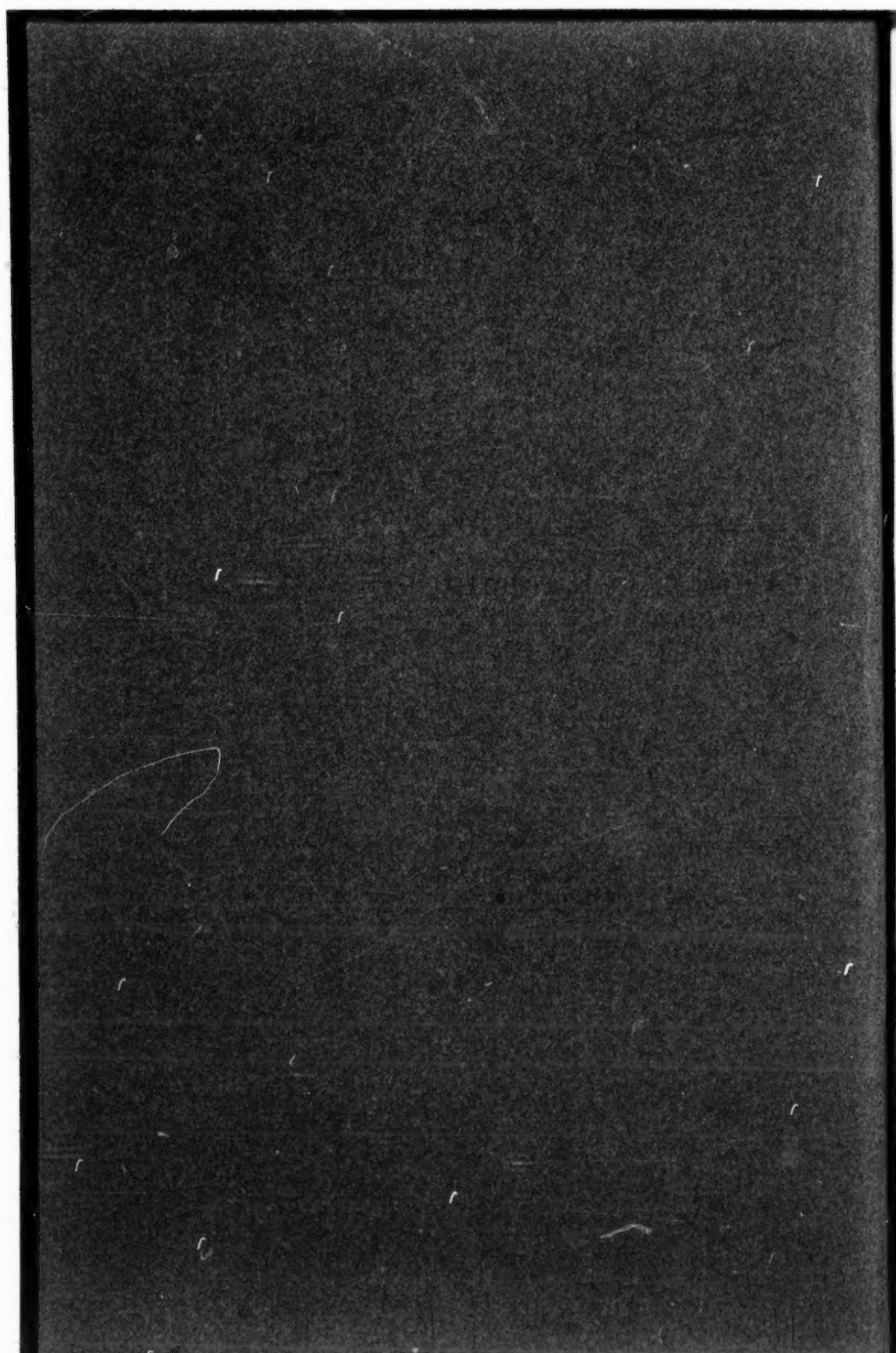
CITY OF EDWARDSVILLE,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MARK LESTER BEENS,
Of Counsel.

GEORGE ALLEN LITTLE,
JOHN FREDERICK BECK,
Corporation Counsel,
Attorneys for Defendant in Error.



INDEX.

	Page
Statement	1
Brief of argument.....	6
Argument	13

Table of Cases.

Boise Water Co. v. Boise City, 230 U. S. 84, 90...	19
City of Chester v. Wabash, Chester & Western R. Co., 182 Ill. 382.....	6
C. & V. R. R. Co. v. The People, 92 Ill. 170.....	6
City of Sullivan v. Central Ill. Co., 287 Ill. 19....	9
Central Illinois Public Service Co. v. Swartz, 284 Ill. 108.....	9
City of Quincy v. Jones, 76 Ill. 231, 242.....	6
Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439.....	10
City of Berwyn v. Berglund, 255 Ill. 498.....	10
City of Quincy v. Bull, 106 Ill. 337.....	11
Chicago v. Phoenix Ins. Co., 126 Ill. 276, 280....	12
City of Springfield v. Interstate Telephone Co., 279 Ill. 324.....	6, 8, 11, 18
Canterbury v. Miller, 76 Ill. 367.....	11
Edwardsville v. Central Union Tel. Co., 302 Ill. 362, 364.....	8, 19
East St. Louis v. East St. Louis Gas, Light & Coke Co., 98 Ill. 449.....	11
Edwardsville v. Central Union Tel. Co., 309 Ill. 482, 483.....	16, 20
Edwardsville v. Central Union Tel. Co., 227 Ill. App. 424, 430.....	17
Hibbard et al. v. Chicago, 173 Ill. 91, 97.....	10

Joel v. Bennett, 276 Ill. 537, 542.....	21
Kreigh v. City of Chicago, 86 Ill. 407.....	6
New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 30.....	8
Pennsylvania Co. v. Bond, 202 Ill. 95.....	6
People v. Union Gas Co., 254 Ill. 395.....	9
People v. Blocki, 203 Ill. 363, 372.....	10
Patmor v. Haggard et al., 78 Ill. 610.....	11
People v. C. U. T. Co., 192 Ill. 307.....	18
Sears v. City of Chicago, 247 Ill. 204.....	6
Springfield v. Interstate Tel. Co., 279 Ill. 324	6, 8, 11, 18
Springfield v. Postal Teleg. Co., 253 Ill. 346, 354..	6
Safety Insulated W. & C. Co. v. Mayor etc. of Baltimore, 66 Fed. Rep. 140, 143, 144.....	8, 15
St. Clair Co. Turnpike Co. v. People, 82 Ill. 174, 177	9
Statute of the State of Illinois, Ch. 24, par. 65...	7
Statute of the State of Illinois, Ch. 134, Sec. 4...	7
Village of Altamont v. B. & O. S. W. Ry. Co., 184 Ill. 47.....	10
Village of Madison v. The Alton, Granite & St. L. Traction Co., 235 Ill. 346.....	11
Village of London Mills v. White, 280 Ill. 289....	18
Walla Walla v. Walla Walla Water Company, 172 U. S. 1.....	18

No. 37.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1925.

CENTRAL UNION TELEPHONE COMPANY,	} Plaintiff in Error,
vs.	
CITY OF EDWARDSVILLE,	
Defendant in Error.	}

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This case now before this Court on the writ of error allowed was originally begun in the Madison County, Illinois, Circuit Court to the May Term thereof, A. D. 1919, by a suit brought by the defendant in error against the plaintiff in error in an action of **debt**, and not of **assumpsit**, as stated in the mandate of the Court transferring the case to this Court, as shown in the

transcript of the record at page 54, bottom line. The suit was to recover the sum of fifty cents for each of the telephone poles owned by the plaintiff in error located in the streets of the city for the years 1914 to 1918 inclusive, based upon an ordinance of the city passed and approved July 7, 1914, and known as Ordinance No. 369. The pleadings in the case brought under consideration two other prior measures passed by the City Council, so that a review of the case involves the consideration of three measures passed by the City Council of the city, to wit:

First. An ordinance known as Ordinance No. 72, July 5, 1882.

Second. The resolution of September 7, 1897.

Third. Ordinance No. 369 of July 7, 1914, as stated above.

The provisions of each of these are set out in the transcript of the record herein at pages 20 to 23.

We controvert the statement of the plaintiff in error in its statement here that,

“This case involves the constitutionality under the Federal Constitution of an ordinance of the City of Edwardsville known as Ordinance No. 369, passed July 7, 1914.”

As we stated in the former statement the city's contentions in this case are:

First. That Ordinance No. 72 of July 5, 1882, is not a contract ordinance, but a mere permission or license on conditions; that no consideration is expressed anywhere in its provisions, and no contractual relation arises therefrom, and that no acceptance of its provisions was required.

Second. That the resolution of September 7, 1897, was simply a request on the part of the city that the company, plaintiff in error here, furnish certain things therein mentioned and give certain rights or privileges as therein stated; that its required acceptance by the company did not create a contract relation for the reason that if it was intended to become a contract upon acceptance the City Council should have acted by ordinance and not by mere resolution. We contend that legislative sanction is essential to use of the street by telegraph and telephone companies, and that that sanction cannot be given by mere resolution. We further contend that the resolution of September 7, 1897, cannot be considered as an amendment to or part of the ordinance of July 5, 1882.

Third. That the ordinance of July 7, 1914, was a valid and lawful exercise of the delegated powers of the city over the streets, alleys and sidewalks, and that the city had the right thereby to fix a reasonable

compensation for the use of the same by telegraph or telephone companies, and that said ordinance is a general ordinance applicable as well to the plaintiff in error here as to any other person, firm or corporation coming within its provision.

Fourth. That under the stipulation of facts in this case there is no contract between the city and the company arising by and under Ordinance No. 72, of July 5, 1882, and the resolution of September 7, 1897, referring to said ordinance, and the acceptance of the said resolution by the company, and its acts thereunder and thereafter, that would deprive the right of the city to enact Ordinance No. 369 of July 7, 1914, and make same applicable to the company.

With the case now in this court we desire to add a fifth contention: That under the decisions of the trial, Appellate and Supreme Courts of this state, holding that Ordinance No. 369 is applicable to this company, plaintiff in error, and by further holding that Ordinance No. 72, of July 5, 1882, is not a contract ordinance, and that the resolution of September 7, 1897, cannot make it one, there is no constitutional question that can be raised as to the impairment of the obligations of a contract, and hence the case should be dismissed in this court for want of jurisdiction. And for a further contention in this court, if jurisdiction is assumed, is that, as the courts below

have held that the passage of Ordinance No. 369 was an exercise of the proprietary rights of the city in the streets, and not the exercise of any governmental powers, no federal constitutional question can be involved in the enforcement of the provisions of Ordinance No. 369 and this Court should so hold.

With these contentions established there can be no question as to the applicability of Ordinance No. 369 to the plaintiff in error herein free of all constitutional objections; and this we will endeavor to do in the brief and argument following.

BRIEF OF ARGUMENT.

I.

The Rights of a City in Its Streets.

(a) Fee is in the city.

City of Chester v. Wabash, Chester & Western
R. Co., 182 Ill. 382;

C. & V. R. R. Co. v. The People, 92 Ill. 170.

(b) City has power to fix a charge in the nature
of rental for the occupation by a public service cor-
poration of parts of the streets, as it did by Ordi-
nance No. 369.

Springfield v. Inter-State Tel. Co., 279 Ill. 324;
Springfield v. Postal Teleg. Co., 253 Ill. 346,
354.

(c) A city cannot alienate its streets or divest itself
of control over them by conferring rights incon-
sistent with its duty to the public for whom it holds
its streets in trust with the duty to keep them open
and not appropriate them to the benefit of any indi-
vidual or corporation.

Sears v. City of Chicago, 247 Ill. 204;
Pennsylvania Co. v. Bond, 202 Ill. 95;
Kreigh v. City of Chicago, 86 Ill. 407;
City of Quincy v. Jones, 76 Ill. 231, 242.

II.

Statutory Provisions.

The statute of the State of Illinois in Ch. 24, Art. V, Sec. 1 (Ch. 24, par. 65), provides that the City Council in cities shall have the following powers as to streets:

Seventh Clause. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Ninth Clause. To regulate the use of the same.

Seventeenth Clause. To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting hand bills and advertisements.

Ch. 134, Sec. 4, of said statute provides that no telegraph (and telephone) company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines along or upon any * * * street, alley or other highway or public ground, within any incorporated city, town or village, without the consent of the corporate authorities of such city, town or village.

III.

Exercise of Proprietary Powers of City.

(a) Ordinance No. 369 of the City of Edwardsville was not adopted for the enforcement of any governmental power, but in the exercise of the proprietary power of the city.

Edwardsville v. Central Union Tel. Co., 302 Ill.
362, 364;

Springfield v. Inter-State Tel. Co., 279 Ill.
324, 327.

(b) The city having passed Ordinance No. 369 in its proprietary capacity, it was not acting for the State of Illinois, but as a private corporation.

Safety Insulated W. & C. Co. v. Mayor etc. of
Baltimore, 66 Fed. Rep. 140, 143, 144.

(c) The Supreme Court of the United States, therefore, has no jurisdiction in this case to review the judgment of the Supreme Court of Illinois on the ground that an obligation of a contract has been impaired.

New Orleans Waterworks Co. v. Louisiana
Sugar Refining Co., 125 U. S. 18, 30.

IV.

**Municipality Possesses No Power to Confer
Franchise.**

As to the grant given by the City to the company under ordinance No. 72:

It was a "permission granted to erect and maintain a system of telephones or a telephone exchange in the City of Edwardsville."

(a) The power to confer a franchise rests only with the state, and when a municipality grants to a corporation the right to use the streets of the City the right is not a franchise, but a license.

City of Sullivan v. Central Ill. Co., 287 Ill. 19;
Central Ill. Public Service Co. v. Swartz, 284
Ill. 108;

People v. Union Gas Co., 254 Ill. 395.

V.

**Grants Construed Strictly Against Private
Corporations.**

Grants to private corporations are*to be construed liberally in favor of the public and strictly against the corporation. Whatever is not unequivocally granted is taken to have been withheld.

St. Clair Co. Turnpike Co. v. People ex rel., 82
Ill. 174, 177.

VI.

As to the Resolution of September 7, 1897.

The passage and acceptance of this resolution created no contract for the use of the streets, sidewalks and alleys of the City which would prevent the passage and enforcement of ordinance No. 369.

(a) Acts of a city which have for their object the carrying into effect of their charter powers thus granted are legislative in their character, and it is well settled that acts of municipal corporations which are legislative in their character must be put in form of ordinances and not mere resolutions.

17 Am. & Eng. Encyc. of Law, page 236, and cases cited;

Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439;

Village of Altamont v. B. & O. S. W. Ry. Co., 184 Ill. 47;

City of Berwyn v. Berglund, 255 Ill. 498.

(b) An ordinance cannot be amended, repealed or sustained by a resolution or other act of less dignity than itself.

Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439, 445;

Hibbard et al. v. Chicago, 173 Ill. 91, 97;

People v. Blocki, 203 Ill. 363, 372.

VII.

As to Ordinance No. 72 of July 5, 1882.

(a) It is not a contract ordinance. It fails to meet the definition of a contract.

2 Blackstone, Com. 446;
East St. Louis v. East St. Louis Gas, Light &
Coke Co., 98 Ill. 449;
Patmor v. Haggard et al., 78 Ill. 610;
Canterbury v. Miller, 76 Ill. 367.

(b) A contract ordinance is one in which the consideration of the contract is expressed in the terms and provisions of the ordinance itself.

Springfield v. Interstate Telephone & Telegraph Co., 279 Ill. 324 (where the consideration is set out in Sec. 5 of the ordinance);

Village of Madison v. The Alton, Granite & St. L. Traction Co., 235 Ill. 346 (wherein Sec. 10 of the ordinance sets out the effect of its passage and acceptance by stating that it shall constitute a binding contract between said company and the village);

City of Quincy v. Bull, 106 Ill. 337 (Sec. 10 of the ordinance contains the consideration).

(c) The proviso contained in ordinance No. 72 is merely a statement of the condition on which the

prior rights given in the ordinance were to become effective. It was a limitation on the preceding clause of the section in which it occurs, and it is not used to express the consideration for a contract relation. The office of a proviso in statute (or ordinance) is to qualify or limit the enactment itself and not to confer grant of power.

Chicago v. Phoenix Ins. Co., 126 Ill. 276, 280.

ARGUMENT.

In Illinois the fee to the streets is in the city and it holds its streets in trust for the public [Br. I, (a) (c)]. Aside from the point raised by plaintiff in error that ordinance No. 369 is unconstitutional on the ground of impairing the obligations of a contract, there can be no question about the right of the city to fix a charge in the nature of rental for the occupation by a public service corporation of parts of its streets, as it did by said ordinance [Br. I (b)].

Defendant in error is a municipal corporation organized under the General Incorporation Act of the State of Illinois. Under that act it has authority to regulate the use of its streets. Chapter 134, Section 4, of the Statutes of Illinois requires telephone companies to procure the written consent of cities to erect poles, wires, etc., in its streets (Br. II). Under its governmental powers as derived from the state the city in July, 1882, passed ordinance No. 72 under which the plaintiff in error is occupying the streets of the City of Edwardsville. The resolution of September 14, 1897, can have no effect upon ordinance No. 72 because an ordinance cannot be amended, repealed or sustained by resolution or other act of less dignity than the ordinance itself (Br. V). That resolution was passed by the city long after the tele-

phone company was in possession of the streets under ordinance No. 72, and, as said in the opinion of the Illinois Supreme Court in this case (309 Ill. 482, 485), it requested the company to perform certain services which the company was in a position to grant or refuse. After the passage of that resolution the parties to this suit stood in the same legal relationship as previously under ordinance No. 72, and the passage of that resolution has no bearing upon the rights of the city to pass ordinance No. 369.

Under the laws of the State of Illinois the power to confer a franchise rests only with the state, and when a municipality grants to a corporation the right to use the streets of the city the right is not a franchise but a license [Br. IV (a)]. Under ordinance No. 72 the city simply granted the company permission "to erect and maintain a system of telephones for a telephone exchange" in the city, and it gave that permission without a consideration. The act of passing ordinance No. 72 was the performance by the city of its governmental power as conferred upon it by the state. In its proprietary capacity [Br. III (a)] the city passed ordinance No. 369, providing for a rental to be paid by the telephone company for the space occupied by its poles in the streets, and of which space the company as effectually dispossesses the general public as if it destroyed that amount of ground. This rental ordinance was passed for the

private advantage and benefit of the city as a distinct legal personality, and as to such power and act the city is to be regarded as a private corporation. In the case of *Safety Insulated W. & C. Co. v. Mayor etc. of Baltimore*, 66 Fed. Rep. 140, on page 143 the Court says:

“But in its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct legal personality. As to such powers, and as to the property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded quoad hoc a private corporation.”

The state had nothing whatever to do with the passage of ordinance No. 369. It was not passed by the city under the governmental power conferred upon it. The state being no party to ordinance No. 369 it has not passed any law impairing the obligation of contracts, as prohibited by the Federal Constitution. Consequently, this Court has no jurisdiction of this case, there being no other ground to give it jurisdiction. This case differs from cases where a city has entered into a contract in its governmental capacity for a consideration, and then in the same capacity undertakes to violate that contract by im-

posing additional conditions, such as imposing a license fee.

In the case at bar ordinance No. 72 is not a contract ordinance (Br., VII). There is no consideration expressed in the ordinance for the consent given the telephone company for occupying the streets. As to the construction and effect of ordinance No. 72, the resolution of 1897 and ordinance No. 369 the Supreme Court of Illinois in this case (309 Ill. 482), on page 486, says:

“Rules of construction are an aid to the determination of the intent of the legislative body—not a means of defeating that intent—when clearly expressed. In the Springfield case, *supra* (City of Springfield v. Interstate Telephone Co., 279 Ill. 324), the rule that a particular provision controls a general provision was properly applied because of the circumstances indicating such an intention. The fact that the specific grant designating a consideration was subsequent to the general ordinance in that case made this intention clear, though this statement is not to be construed as an expression of the view that a particular provision must be subsequent to the general order to be construed as an exception thereto. In the present case not only is the specific grant to the company earlier than the general ordinance, but it expresses no consideration. Neither the specific grant of 1882 nor the resolution of 1897 constitutes a definite expression of consideration, which, as a matter of construc-

tion, takes this company out from under the language of the 1914 ordinance imposing a charge or consideration for the occupancy of the streets by poles. To so hold would run counter to what seems to be the clear intent of the language of the ordinance of 1914. In the Springfield case, *supra*, there was an express consideration in a general ordinance, replaced by an express consideration in a special grant. Here we are asked to read what is urged to be an implied consideration in a special grant as an exception to an express consideration in a later general ordinance. This goes beyond the province of construction."

To that we want to add that grants to private corporations are to be construed liberally in favor of the public and strictly against the corporation. Whatever is not unequivocally granted is taken to have been withheld (Br., V).

Plaintiff in error contends that where the privilege of the use of a street is granted by an ordinance, which is accepted and acted upon by the grantee, the ordinance becomes a binding contract between the city and the company from which the city cannot recede, and as such is protected against subsequent impairment by legislative action. On examination of the authorities cited by plaintiff in error it will be observed, as stated in the opinion of the Appellate Court of Illinois, Fourth District, in this case (227 Ill. App. 424, 430) "that all or nearly all of them are

cases where the municipality was seeking to oust the public service corporation upon the ground that it had no valid or binding contract with the city under which it could operate." In some cases cited, as in *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, there is a consideration expressed in the ordinance there involved, while in the case at bar no consideration is expressed; in *Springfield v. Interstate Ind. Tel. Co.*, 279 Ill. 324, the consideration is expressed in section 5 of the ordinance and the Court, on page 328, says:

"The expression in the ordinance of the consideration for the right to occupy the streets in the manner and for the purpose mentioned in the ordinance excluded the right to demand another and different consideration for the right so to occupy the streets."

In *Village of London Mills v. White*, 280 Ill. 289, there was a combination, which the Court referred to as being corrupt in its character, for the purpose of ousting the complaining public service corporation from the streets and to give its rights to another company. In the case of *People v. C. U. T. Co.*, 192 Ill. 307, an effort was made to oust a telephone company by quo warranto proceedings. For similar reasons all of the other cases cited on that question by plaintiff in error are not in point. In the case at

bar no effort is made to oust plaintiff in error from the streets.

Plaintiff in error says on page 12 of its brief that Ordinance No. 369 is not a police ordinance, but is one solely to raise revenue by a charge in the nature of a rental for the use of space in streets. Not one of the four cases cited thereunder sustains the statement with reference to the ordinance being one to raise revenue, while the Supreme Court of Illinois in this case (302 Ill. 362, 364) expressly says:

“This case, therefore, does not present a question relating to revenue and it does not involve a franchise or freehold.”

On page 12 of its brief plaintiff in error cites *Boise Water Co. v. Boise City*, 230 U. S. 84, 90, under the statement that as against a company having a valid right to occupy the streets under a grant from a municipality a subsequent rental ordinance is unconstitutional. In that case the city undertook to impose a license upon the Water Company and expressly referred to a prior ordinance in which the company had been given its rights in the streets, and based the city's right to such license upon the former ordinance. In the case at bar there is no reference in Ordinance No. 369 to Ordinance No. 72, and no connection whatever between them. Also in the *Boise City* case the city was in both instances acting under

its governmental capacity while in the case at bar the city passed Ordinance No. 369 in its proprietary capacity.

At no time and no place in the progress of this case through the lower courts has the city conceded that a contract relation existed between the city and company, the contention at all times being that Ordinance No. 72 was not a contract ordinance and that there being no contract the constitutional question as to the impairment of the obligation of a contract could not apply, and we say now the holding of the State Supreme Court on the question of waiver is correct, that

“All constitutional issues have been waived by taking an appeal to the Appellate Court, and such issues are not proper for consideration here,”

and disposes of the constitutional questions raised, as held in *City of Edwardsville v. Central Union Tel. Co.*, 309 Ill. 482, 483, 484.

On page 11 of plaintiff in error's brief it cites authorities under the statement that “the constant assertion of the federal right cannot have the effect of a waiver.” When plaintiff in error perfected its appeal to the Appellate Court it ceased to constantly assert its claim under the Constitution because that court had no jurisdiction of and could not hear any such assertion, and by its failure to assert it at the proper time the right was waived and lost.

In regard to the argument and citation of authorities on the part of the plaintiff in error on the questions of waiver and the right of this Court to consider this case we undertake to say counsel for plaintiff in error has cited no case where the issues involved and the claims made are the same as here, and we feel justified in saying in the words of our State Supreme Court in *Joel v. Bennett*, 276 Ill. 537, at page 542:

“The authorities cited by counsel on the question are none of them on all fours with this case. Neither do we consider the reasoning in any of them as controlling here.”

We are, therefore, willing to submit our case on the reasoning and holding of the trial, Appellate and Supreme Courts of this state in this case—that Ordinance No. 369 was not an unconstitutional enactment, but a lawful and valid exercise of the city's delegated powers, and there had nothing taken place in the previous relations of the parties that estopped its application to an enforcement against the plaintiff in error, and the assignments of error are not in point as to the issues involved.

And we finally affirm that under court interpretation and construction an ordinance fixing a compensation charge of 50 cents per pole in the nature of rental for the parts of the streets which the

poles occupy, as in this case, is merely the exercise of the proprietary power of the municipality, and the suit here, for the charge made, does not involve a franchise or freehold nor relate to revenue. It is not a tax or license fee demanded, but a charge of compensation for the use of the streets, and that such an ordinance is a valid and constitutional enactment, lawfully passed, and should be enforced.

We, therefore, respectfully contend that this Court should uphold the decision of the State Supreme Court and affirm its judgment.

Respectfully submitted,

Mark L. Tuttle
.....
Of Counsel.

George Allen Lytle

John Frederick Eck
Corporation Counsel,

Attorneys for Defendant in Error.